164-705

TRANSCRIPT OF RECORD.

164-705

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~642~~. 328 69

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NOTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 13, 1894.

(15507.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 642.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Summons	2	1
Marshal's return	3	1
Declaration	4	2
Bill of particulars	6	3
Exhibit A.—Guarantee	16	8
Exhibit B.—Articles of consolidation	25	12
Demurrer to plea	48	24
Similiter	50	25
Order taking demurrer under advisement	50	25
Opinion	51	25
Judgment	54	27
Petition for writ of error	55	27
Assignment of errors	56	28
Order allowing writ of error	59	29
Clerk's certificate	60	29
Writ of error	61	29
Citation and acceptance of service	62	30

1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court room, in the city of Chicago, in said district, before the Hon. Peter S. Grosscup, district judge of the United States for the northern district of Illinois, on Friday, the tenth day of November, in the October adjourned term of said court, in the year of our Lord one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth year.

S. W. BURNHAM,
Clerk.

UNITED STATES OF AMERICA *vs.* CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.	21741. In assumpsit.

Be it remembered that on this day, to wit, the twenty-sixth day of September, 1890, came the United States of America, by Thomas E. Milchrist, United States attorney, and filed in the clerk's office of said court a præcipe for summons, which said præcipe for summons is in the words and figures following, to wit:

2 *Præcipe for summons.*

United States circuit court, northern district of Illinois, northern division.

THE UNITED STATES OF AMERICA *vs.* CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.	Assumpsit. Damages, $200,000.00.

Let a summons issue as above, returnable to the October adjourned term, 1890.

THOMAS MILCHRIST,
United States Attorney.

To WM. H. BRADLEY, Esq., *Clerk.*

(Endorsed): Filed Sept. 26, A. D. 1890. Wm. H. Bradley, clerk.

On the same day, to wit, the twenty-sixth day of September, 1890, a summons issued out of the clerk's office directed against the Chicago, Rock Island and Pacific Railroad Company, which said summons, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Chicago, Rock Island and Pacific Railroad Company, if found in your district, to be and appear before our
3 judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be

holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto the United States of America of a plea of trespass on the case upon promises, to its damage as is alleged of two hundred thousand dollars, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 26th day of September, in the year of our Lord one thousand eight hundred and ninety and of our Independence the 115th year.

[SEAL.] WM. H. BRADLEY,
Clerk.

Marshal's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I have served this writ upon the Chicago, Rock Island and Pacific Railroad Company therein named by delivering a true copy of the same to R. R. Cable, president of the aforesaid company, on the 26th day of September, A. D. 1890.

FRANK HITCHCOCK,
U. S. Marshal.
GEO. N. JONES,
Deputy.

(Endorsed): Filed Oct. 1, A. D. 1890. Wm. H. Bradley, clerk.

On the same day, to wit, the twenty-sixth day of September, 1890, came the plaintiff in said entitled cause, by the United States
4 attorney and filed in the clerk's office of said court its declaration, which said declaration is in the words and figures following to wit:

Declaration.

In the circuit court of the United States of America for the northern district of Illinois, northern division, of the October adjourned term, in the year of our Lord eighteen hundred and ninety.

NORTHERN DISTRICT OF ILLINOIS,
Northern District, sct.

The United States of America, plaintiffs, by Thomas E. Milchrist, attorney of the United States of America for the northern district of Illinois, complain of the Chicago, Rock Island and Pacific Railway Company, formerly the Chicago, Rock Island and Pacific Railroad Company, a corporation duly organized under the laws of the State of Illinois, and having its principal office in the city of Chicago, in said district and division, defendant, of a plea of trespass on the case on promises, for that, whereas the defendant, on the twenty-fourth day of September, A. D. 1890, was indebted to the plaintiffs in the sum of one hundred and twenty thousand dollars for money before that time received by the defendant for the use of the plaintiffs, and in a like sum for money before that time received by the defendant for the use of the plaintiffs as tolls upon one hundred thousand cars carrying freight (other than those passing over

the road of the defendant, and for the cars of defendant when carrying freight for other roads) carried, transported, and conveyed by the defendant before that time over the railroad bridge of the plaintiffs, constructed and located at and over the Mississippi River at the island of Rock Island, in said river, to connect the said island with the cities of Davenport and Rock Island. And in the sum of sixty thousand dollars for money before that time received by the defendant from the Chicago, Burlington and Quincy Railroad Company for the use of the plaintiffs as two-fifths of the tolls upon fifty thousand cars at the rate of three dollars per car of the said Chicago, Burlington and Quincy Railroad Company carrying freight, and carried, transported, and conveyed by the defendant before that time for said Chicago, Burlington and Quincy Railroad Company over the railroad bridge aforesaid.

And in a like sum for money before that time received by the defendant from the Rock Island and Peoria Railroad Company for the use of the plaintiffs as two-fifths of the tolls upon fifty thousand cars, at the rate of three dollars per car, of the said Rock Island and Peoria Railroad Company, carrying freight and carried, transported, and conveyed by the defendant before that time for the said Rock Island and Peoria Railroad Company over the railroad bridge aforesaid.

And in a like sum for money before that time received by the defendant from the Rock Island and Mercer County Railroad Company for the use of the plaintiffs as two-fifths of the tolls upon fifty thousand cars, at the rate of three dollars per car, of the said Rock Island and Mercer County Railroad Company, carrying freight, and carried, transported, and conveyed by the defendant before that time for the said Rock Island and Mercer County Railroad Company over the railroad bridge aforesaid.

And in a like sum for money before that time received by the defendant from the Chicago, Milwaukee and St. Paul Railroad Company for the use of the plaintiffs, as two-fifths of the tolls upon fifty thousand cars, at the rate of three dollars per car, of the said Chicago, Milwaukee and St. Paul Railroad Company, carrying freight, and carried, transported, and conveyed by the defendant before that time for the said Chicago, Milwaukee and St. Paul Railroad Company over the railroad bridge aforesaid.

And, being so indebted, the defendant, in consideration thereof, then and there promised the plaintiffs to pay them the said sums of money on request, so due to them as aforesaid, yet the defendant, though requested, has not paid the same, or either of them, or any part thereof to the plaintiffs, but refuses so to do, to the damage of the plaintiffs of two hundred thousand dollars, and therefore they bring their suit, etc.

THOMAS E. MILCHRIST,
United States Attorney for the Northern District of Illinois.

Bill of particulars.

The defendant will take notice that the sole cause of action relied on herein is for the amount of tolls collected by the defendant for the use of the plaintiffs upon cars carrying freight (other than those passing over the road of the defendant, and for the cars of the defendant when carrying freight for other roads) carried, transported, and

conveyed by the defendant between March 3d, A. D. 1881, and September 24th, A. D. 1890, over the railroad bridge of the plaintiffs which is mentioned in said declaration as follows:

Chicago, Rock Island and Pacific Railroad Company, in account with The United States of America, Dr.

First, to money had and received	$120,000.00
Second, to tolls collected on 100,000 cars	120,000.00
3rd, to $\frac{1}{2}$ tolls collected on 50,000 cars carried for Chicago, Burlington & Quincy Railroad Co	60,000.00
4th, to $\frac{1}{2}$ of tolls collected on 50,000 cars carried for the Rock Island and Peoria Railroad Company	60,000.00
5th, to $\frac{1}{2}$ of tolls collected on 50,000 cars carried for the Rock Island & Mercer Railroad Company	60,000
6th, to $\frac{1}{2}$ of tolls collected on 50,000 cars carried for the Chicago, Milwaukee & St. Paul Railroad Co	60,000

THOMAS E. MILCHRIST,
U. S. Att'y.

(Endorsed:) Filed Sept. 26, 1890, Wm. H. Bradley, clerk.

8 Afterwards, to wit, on the sixth day of October, 1890, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its plea to the declaration of plaintiff, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company,
ats.
THE UNITED STATES OF AMERICA.

And the said defendant, The Chicago, Rock Island and Pacific Railway Company, impleaded in this action by the name of The Chicago, Rock Island and Pacific Railroad Company, by Thos. F. Withrow, Thos. S. Wright, and Robert Mather, its attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form, as the plaintiff has above thereof alleged against it, and of this, the defendant puts itself upon the country, etc.

9 And for a further plea in this behalf the defendant says action on, because it says that the said several supposed causes of action in the said declaration mentioned are based upon and it is claimed accrue to the said plaintiff under and by virtue of the provisions of section two (2) of an act of Congress "making appropriations for the construction, completion, repair and preservation of certain works on rivers and harbors, and for other purposes," approved March 3rd, A. D. 1881, and not otherwise. And the defendant avers that the said section of said act of Congess is inoperative and void and of no effect in this, to wit:

By an act of Congress "making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and sixty-

eight, and for other purposes," approved March 2nd, 1867, there was appropriated the sum of two hundred thousand dollars for the erection of a bridge at Rock Island, Illinois, and it was therein provided that "the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railoroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, upon the condition that the said company shall, before any money is expended by the Government, agree to pay and shall secure to the United States, first, half the cost of said bridge and, second, half the expenses of keeping said bridge in repair; and upon guaranteeing said conditions to the satisfaction of the Secretary of War, by contract or otherwise, the said company shall have the free use of said bridge for the purposes of transit, but without any claim to ownership thereof."

10 By a joint resolution of Congress of the United States approved July 20th, 1868, it was resolved as follows: "That the act of Congress making appropriations for the support of the Army for the year ending June 30th, eighteen hundred and sixty-eight, and for other purposes," approved March two, eighteen hundred and sixty-seven, be, and the same is hereby, so amended as to authorize and direct the Secretary of War to order the commencement of work on the bridge over the Mississippi River at Rock Island, to connect the said island with the cities of Davenport and Rock Island: Provided, That the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river upon condition that the said railroad company shall pay to the United States, first, half of the cost of the superstructure of the bridge over the main channel and half the cost of keeping the same in repair, and shall also build at its own cost the bridge over that part of the river which is on the east side of the island of Rock Island, and also the railroad on and across said island of Rock Island, and upon a full compliance with these conditions said railroad company shall have the use of said bridge for the purposes of free transit, but without any claim to the ownership thereof, and said railroad company shall, within six months after said new bridge is ready for use, remove their old bridge from the river and their railroad tracks from its present location on the island of Rock Island. And provided further, That the Government may permit any other road or roads wishing to cross on said bridge to do so by paying to the parties then in interest the proportionate cost of said bridge, but no such permission to

11 other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company.

SEC. 2. And be it further resolved: That in case the Rock Island and Pacific Railroad Company shall neglect or fail, for sixty days after the passage of this resolution, to make and guarantee the agreement specified in the act of appropriation aforesaid, approved March second, eighteen hundred and sixty-seven, then the Secretary of War shall be, and is hereby, authorized and required to direct the removal of the existing bridge and to direct the construction of the bridge aforesaid, and expend the money appropriated for that purpose in said act, and the said Rock Island and Pacific Railroad Company shall not have, acquire, or enjoy any right of way or privilege thereon, or the use of said bridge until the agreement

aforesaid shall be made and guaranteed according to the terms and conditions of said act of appropriation. All acts or parts of acts inconsistent with these resolutions are hereby repealed."

Defendant avers that the said "Rock Island and Pacific Railroad Company" in the said act and resolutions mentioned is identical with the said "Chicago, Rock Island and Pacific Railroad Company" in said resolutions mentioned, and that said last-named company was then a consolidated corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and owning and operating as a common carrier of goods and passengers a railroad extending from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

12 Defendant avers that at the date of the passage of said act and of said joint resolutions the said Chicago, Rock Island and Pacific Railroad Company was the owner of a bridge, which was then and there a lawful structure, connecting the said island of Rock Island with the cities of Davenport and Rock Island (being the same bridge described as "their old bridge" in the j'int resolution aforesaid), which said bridge the said railroad company had theretofore built, at a cost to itself of, to wit, five hundred thousand dollars, and over and upon which its said railroad was constructed and operated.

Defendant further avers that, in pursuance of and in compliance with the terms of said act and of said joint resolutions, the said Chicago, Rock Island and Pacific Railroad Company did, within sixty days after the passage of said resolutions, and to the satisfaction of the Secretary of War, by contract, guar'ntee the performance by it of the conditions in said act and said resolutions prescribed; that is to say, that it would pay to the United States half of the cost of the superstructure of the bridge over the main channel and half of the cost of keeping the same in repair, and that it would also build at its own cost the bridge over that part of the river which is on the east side of the island of Rock Island and also the railroad on and across said island of Rock Island, a copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof as fully and with the same effect as though the same were herein specifically set forth, and defendant avers that said Chicago, Rock Island and Pacific Railroad Company did, in compliance with the terms of said contract pay to

13 the United States, plaintiff herein, half of the cost of the superstructure of said bridge over the main channel, and has ever since from time to time paid to the United States half of the cost of keeping the same in repair, and did also build, at its own cost, the bridge over that part of the river which is on the east side of the island of Rock Island and also the railroad on and across said island of Rock Island, said several payments and expenditures aggregating the sum of, to wit, one million dollars ($1,000,000) and did at its own cost, within six months after said new bridge was ready for use, remove its old bridge from the river and its railroad track from its then location on the island of Rock Island, and has in all respects kept and performed all the promises, covenants, and agreements in said contract specified on its part to be kept and performed.

Defendant further avers that upon the completion of said new bridge and upon the performance of the said several conditions in said act, said resolutions, and said contract specified the said Chicago, Rock Island and

Pacific Railroad Company, with the consent and approval of plaintiff, built its railroad over, upon, and across said bridge and said island of Rock Island and from thenceforth up to the date of the consolidation hereinafter menti'ned operated its said railroad over, upon, and across said bridge and island as a part of its continuous line of railroad from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa, in the transaction of its business and the performance of its duties as a common carrier of goods and passengers. An' defendant avers that the said act of Congress, the said joint resolutions, and
14 the contract entered into and the acts done and expenditures made by the said Chicago, Rock Island and Pacific Railroad Company in pursuance thereof constitute a contract between the plaintiff and said Chicago, Rock Island and Pacific Railroad Company which it is not within the power of the Congress of the United States to abrogate, modify, or impair, and that by virtue thereof the said Chicago, Rock Island and Pacific Railroad Company acquired a vested and indefeasible right to the perpetual use of said bridge for all purposes necessary or incident to the operation of its said railroad over, upon, and across the same free from any and all charges, levies, tolls, or other impositions by or on behalf or for the benefit of the said plaintiff.

Defendant further avers that the said Chicago, Rock Island and Pacific Railroad Company, by virtue of the powers conferred upon it by the laws of the States of Illinois and Iowa, did, on the second day of June, A. D. 1880, enter into certain articles of consolidation with the Iowa Southern and Missouri Northern Railroad Company, The Newton and Monroe Railroad Company, The Atlantic Southern Railroad Company, The Avoca, Macedonia and Southwestern Railroad Company, and the Atlantic and Audobon Railroad Company, all corporations organized and existing under and by virtue of the laws of the State of Iowa, whereby the said constituent companies consolidated, united, and merged their capital stocks, corporate and other franchises, rights, privileges, and property of every nature and description, and thereby created one consolidated corporation known by the corporate name of The Chicago, Rock Island and Pacific Railway Company, which said consolidated corporation is the present defendant. A copy of said articles of consolidation is
15 hereto attached, marked "Exhibit B," and made a part hereof as fully and with the same effect as if the same were herein specifically set forth.

And defendant avers that by virtue of said articles of consolidation the right of said Chicago, Rock Island and Pacific Railroad Company to the perpetual and free use of said bridge, as aforesaid, passed to and became vested in this defendant as fully and to the same effect as the same had theretofore existed in favor of the said Chicago, Rock Island and Pacific Railroad Company.

And defendant avers that by virtue of the said articles of consolidation it did, on the said second day of June, A. D. 1880, take possession of the railroad of said Chicago, Rock Island and Pacific Railroad Company, including that portion of its said railroad so constructed over, upon, and across the bridge aforesaid, and has ever since continued to operate the same in the transaction of its business and the performance of its duties as a common carrier of goods and passengers, and that said portion of its

railroad so constructed over, upon, and across said bridge as aforesaid, is a necessary part of its continuous system of railroad extending from points in the State of Illinois to points in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, and the Indian Territory. And in the perf*o*mance of its duties as a comm'n carrier as aforesaid, defendant is compelled to receive and does receive at connecting points upon its line near the respective termini of said bridge in the cities of Rock Island, State of Illinois, and Davenport, State of Iowa, cars of other roads carrying freight and destined to points on said roads beyond said bridge or destined for delivery at the further terminus of said bridge, and is likewise compelled to
16 receive and does receive in its own cars at said connecting points freight to be carried across said bridge for other roads, and defendant avers that in the course of its business and in the performance of its duties as a common carrier as aforesaid, it has received from time to time from the said railroad companies in said declaration mentioned at said connecting points near the respective termini of said bridge cars of said other railroads carrying freight, and has carried the same across said bridge, and has in like manner transported its own cars carrying freight for said other roads across said bridge, and that the said several supposed cars in the said declaration mentioned, if any of the same were carried by the defendant over the bridge of the plaintiff aforesaid, were so carried by defendant in the regular course of its business and in the performance of its duties as a common carrier as aforesaid, and this the defendant is ready to verify.

THOMAS S. WRIGHT,
ROBERT MATHER,
Attys. for Defendant.

EXHIBIT A.

Guarantee by the Chicago, Rock Island, and Pacific Railroad Company to fulfil' the conditions required by law in regard to the construction of a bridge at Rock Island, Illinois.

Whereas by an act of the Congress of the United States of America, entitled "An act making further provision for the establishment of an armory and arsenal of construction, deposit, and repair on Rock
17 Island, in the State of Illinois," approved June 27th, 1866, it is enacted as follows:

1. "That the Secretary of War be, and is hereby, authorized and directed to change, fix, and establish the position of the railroad across Rock Island, and the bridge across the Mississippi River at and on the island of Rock Island so as best to accord with the purposes of the Government in its occupancy of said island for military purposes; and in order to effect this he is authorized to grant to the railroad company a permanent location and right of way on and across Rock Island to be fixed and designated by him with such quantity of land, to be occupied and held by the company for railroad purposes, as may be necessary therefor, and that the said grant and change be made on such terms and conditions previously arranged between the Secretary of War and the companies and parties in interest, as will best effect and secure the purposes of the Government in occupying the island.

2. "That the Secretary of War be, and he is hereby, authorized to grant to the companies and parties in interest such other aid, pecuniary or otherwise, toward effecting the change in the present location of their road and bridge and establishing thereon a wagon road for the use of the Government of the United States to connect said island with the cities of Davenport and Rock Island, to be so constructed as not materially to interfere with, obstruct, or impair the navigation of the Mississippi River as may be adjudged to be fair and equitable by the board of commissioners authorized under the act of April 19th, 1865, entitled 'An act in addition to an act for the establishment of certain arsenals, and may be approved by him.'"

And whereas said board of commissioners, in a report upon the
18 matter of the railroad and bridge across Rock Island and the Mississippi River, under the date of February 2nd, 1867, adopted and recommended the following propositions as to the kind of wagon road that should be established, and the amount and kind of aid that should fairly and equitably be granted by the Government toward effecting that object, to wit:

"The Government to build over the main channel of the river an iron drawbridge in accordance with the conditions prescribed in the act of Congress of July 25th, 1866, the frame to be of proper breadth for a double track, the wagon way to be planted high enough to leave the lower chord for a railroad track, the Government to give the company the right of way over this bridge and across the island upon the payment of half the cost of the superstructure of the bridge, the bridge to be built with due regard to economy, having reference to strength and durability; the company to have five years from January 1st, 1867, in which to connect with the new bridge and to remove its presents tracks across the island and the old bridge and piers from the main channel; the company to open wagon ways for the use of the Government through their present embankment on the island and remove as far as practicable present obstruction to wagon traffic between the island and city of Rock Island, the Government to have the right to connect with the track of the company such side tracks as may be desired for the United States and at such points as the Ordinance Department may select."

And whereas the Chief Ordinance, Brevet Major-General A. B. Dyer, in
a report to the Secretary of War, dated February 8th, 1867,
19 approved the foregoing recommendations of the said board of commissioners respecting the location of the railroad across the island and the bridge across the Mississippi River, the granting of a permanent right of way across the island and the kind and character of the bridge to be erected, which recommendation so approved by the Chief of Ordinance and adopted by him, is understood and here taken to be the recommendation of that officer, to which reference is made in the first section of the act of Congress of March 2, 1867, hereinafter mentioned.

And whereas by the first section of the act of Congress entitled "An act making appropriations for the support of the Army for the year ending June 30th, 1868, and for other purposes," approved March 2, 1867, there is appropriated "for the erection of a bridge at Rock Island, Illinois, as recommended by the chief of ordinance, two hundred thousand dollars, provided that the ownership of said bridge shall be and remain in the

United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, upon the condition that the said company shall, before any money is expended by the Government, agree to pay and shall secure to the United States first, half the cost of said bridge, and second, half the expenses of keeping said bridge in repair, and upon guaranteeing said conditions to the satisfaction of the Secretary of War by contract or otherwise, the said company shall have the free use of said bridge for purposes of transit, but without any claim to ownership thereof."

20 And whereas by a joint resolution of the Congress of the United States "in relation to the Rock Island bridge" approved July 20th, A. D. 1868, it was provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the act of Congress making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes, approved March 2, 1867, be, and the same is hereby, so amended as to authorize and direct the Secretary of War to order the commencement of the work on the bridge over the Mississippi River at Rock Island, to connect the said island with the cities of Davenport and Rock Island: Provided, That the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river upon condition that the said railroad company shall pay to the United States, first, half of the cost of the superstructure of the bridge over the main channel and half the cost of keeping the same in repair, and shall also build at its own expense the bridge over that part of the river which is on the east side of the island of Rock Island, and also the railroad on and across said island of Rock Island; and upon a full compliance with these conditions said railroad company shall have the use of said bridge for the purposes of free transit, but without any claim to the ownership thereof; and said railroad company shall, within six months after said new bridge is ready for use, remove their old bridge from the river and their railroad track from its present location on the island of Rock Island: And provided further, That the Government may permit any other road or roads wishing to

21 cross on said bridge to do so by paying to the parties then in interest the proportionate cost of said bridge, and securing to be paid its proportionate cost of keeping the same in repair, but no such permission to other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company; and the total cost of said bridge shall not exceed the estimate made by the commissioners appointed under the act approved June 27, 1866: And provided also, That in no case shall the expenditure on the part of the United States exceed one million dollars."

"SEC. 2. And be it further resolved, That in case the Rock Island and Pacific Railroad Company shall neglect or fail for sixty days after the passage of this resolution to make and guarantee the agreement specified in the act of appropriation "aforesaid approved March 2, 1867, then the Secretary of War is hereby authorized and required to direct the removal of the existing bridge and to direct the construction of the bridge aforesaid and expend the money appropriated in said act, and the said Rock

Island and Pacific Railroad Company shall not have, acquire, or enjoy any right of way or privilege thereon, or the use of said bridge, until the agreement aforesaid *aforesaid* shall be made and guaranteed according to the terms and conditions of said act of appropriation. All acts or parts of acts inconsistent with these resolutions are hereby repealed."

"SEC. 3. And be it further resolved, That any bridge built under the provisions of this resolution shall be constructed so as to conform to the requirements of section 2 of an act entitled "An act to authorize the con-
22 struction of certain bridges and establish them as post roads," approved July 25th, 1866.

Now, therefore, for the purpose of carrying into full effect the provisions of the several laws aforesaid, and for the considerations hereinafter set forth, the Chicago, Rock Island and Pacific Railroad Company, by John F. Tracy, its president, who is duly authorized and empowered by the said company to bind the same hereunto, hereby covenants and agrees with the United States of America, hereinafter represented in this behalf by Jno. M. Schofield, Secretary of War, as follows:

First. The said company will at its own expense relocate its railroad track across the island of Rock Island, upon such line as may be there designated by the Secretary of War, in pursuance of the act of June 27, 1866, and the Secretary of War shall grant to said company, upon the line so designated, a permanent location and right of way, of a width to be fixed by him, with such quantity of land to be occupied and held by the company for railroad purposes as may be necessary for the convenient construction of its tracks and the passage of its trains, which grant shall not authorize the company to erect any structures upon the land so granted, except the railroad tracks necessary for its business, nor to use said land for other purposes than the construction and keeping in repair of its necessary tracks and the passage of its trains; and the United States shall have the right to connect with the track of the company upon said island such side tracks as may be desired for the use of the United States and at such points on said island as the Ordinance Department may select.

23 Second. Said company will at its own cost construct that part of the bridge to connect the island with the cities of Davenport and Rock Island, which is on the east side of the island, to be of such character and to be built in such manner as shall be agreed upon between the said company and the Secretary of War, the same to be completed as soon as that portion of said bridge on west side of the island is completed.

Third. The company shall, on the first day of January, A. D. 1872, pay to the Government of the United States one-half the cost of the superstructure of that portion of said bridge which is to be built by the Government of the United States over the main channel of said river: Provided, That the aggregate cost of said bridge shall not exceed twelve hundred and ninety-six thousand two hundred and ninety-two dollars and eleven cents, the estimate of the same by the commissioners appointed under the act approved June 27, 1866: And provided further, That the said bridge shall be completed in such manner as to afford a safe and proper crossing for the railroad trains of the said company and in such manner that the railroad of said company can be connected therewith by suitable and practicable embankments before the money stipulated to be paid herein by said

company to the United States shall become due and payable; And provided further, That the said bridge shall be built upon a plan to be agreed upon between the said company and the Secretary of War, or in case of failure to make such agreement, the point in controversy shall be finally determined by one competent engineer to be appointed by the Secretary of War and one to be appointed by said company, they two to choose a third in case of *their* a disagreement to act as umpire.

24 Fourth. The United States are to keep said bridge in repair, and the said company agrees to forever pay one-half the cost thereof from time to time as the same shall accrue, but the sleepers and rails are to be put down upon the bridge and kept in repair at the expense of the railroad company, without cost to the United States, who will make all repairs to the wagon road without cost to the company.

Fifth. The said company agrees to relocate the track across said island and to remove its present bridge across the main channel of said river west of said island within six months after the completion of the said new bridge ready for use.

In witness whereof these presents are signed by the Secretary of War, on behalf of the United States, and by *Tonn* F. Tracy, president of the Chicago, Rock Island and Pacific Railroad Company, he being thereto lawfully authorized, and the seal of said company being hereunto affixed.

[SEAL.] T. M. SCHOFIELD,
[SEAL.] JOHN F. TRACY,
President Chi., R. Isld. and Pac. R. R. Co.

Attest:
EBENESER COOK,
Secy. C., R. I. & P. R. R. Co.

25 EXHIBIT "B."

Parties. Articles of consolidation entered into this second day of June, in the year one thousand eight hundred and eighty, by and between the Chicago, Rock Island and Pacific Railroad Company, a corporation organized and existing under the laws of the States of Illinois and Iowa, party of the first part; the Iowa Southern and Missouri Northern Railroad Company, party of the second part; the Newton and Monroe Railroad Company, party of the third part; the Atlantic Southern Railroad Company, party of the fourth part; the Avoca, Macedonia and Southwestern Railroad Company, party of the fifth part, and the Atlantic and Audubon Railroad Company, party of the sixth part—the said parties of the second, third, fourth, fifth, and sixth parts being corporations which were organized and now exist under the laws of the State of Iowa, which articles witness: That,

Preamble. Whereas the several railroads by said parties severally owned or held under indentures of lease are operated by the party of the first part as parts of one railway system extending through or into the States of Illinois, Iowa, Missouri, and Kansas; and

Whereas the owners of the shares of the capital stock of the party of the first part are also the owners of the capital stock and bonds of the other parties hereto; and

Whereas a consolidation, union, and merger of the capital stocks and corporate and other franchises, rights, privileges and property of
26 each and all of said parties into a consolidated corporation, which will own and be possessed of all the corporate and other franchises, rights, privileges, immunities, and property of each and all of said parties, will, in the judgment of each of said parties, secure greater economy and efficiency in the management and operation of said lines and thereby promote the interests of the public and of said corporate parties and of all the shareholders in each of them; and

Whereas the proposition to so consolidate, unite, and merge has been submitted to the stockholders of each of said parties at meetings duly convened and held, upon notice given in manner and form as required by law and the by-laws of the several parties and said proposition has been approved by votes had at said several meetings, of majorities, consisting of the holders of over three-fourths in amount of the capital stock of each of said parties;

Therefore, the said parties of the first, second, third, fourth, fifth, and sixth parts, severally, in consideration of the premises and the mutual execution of these articles, do convey, covenant, and agree as follows:

ARTICLE I.

Corporate name.

They do hereby consolidate, unite, and merge their capital stocks, corporate and other franchises, rights, privileges, and property of every nature and description and hereby create one consolidated corporation, which shall be known by the corporate name of the Chicago, Rock Island and Pacific Railway Company.

ARTICLE II.

27

Grants to the consolidated corporation.

The said parties of the first, second, third, fourth, fifth, sixth parts do respectively and severaly grant, bargain, sell, release, convey, assign, transfer, and set over unto the Chicago, Rock Island and Pacific Railway Company, the consolidated corporation hereby created, the several and respective railroads, railroad lands, rights of way, stations, station grounds, lands, lots, bridges, cars, locomotives, rolling stock, tools, machinery, fuel, timber, iron, stone, materials, and goods and chattels, and all and singular the several and respective bonds, bills, notes, accounts, demands, money, and things in action, and all and singular their several and respective estates, property, and effects, real and personal, movable and immovable, wheresoever, howsoever, and by whomsoever held; and all and singular their several and respective corporate and other franchises, rights, privileges and immunities; and do mutually agree and declare that the same shall, from the execution of these articles and henceforth be held and possessed by said consolidated corporation, its successors and assigns, forever to and for its own use, benefit, and behoof forever to all intents and purposes.

Obligations assumed by consolidated corporation.

And they do further agree and declare that all of the debts, obligations, and liabilities whatsoever of said parties, and of each of them respectively, from the execution of these articles, and henceforth shall be, and are the proper debts,

obligations, and liabilities of said consolidated corporation, and its
28 successors forever, to all intents and purposes, and that all of the contracts, bonds, certificates, deeds, and other acts and writings of each of the said parties shall continue in full force and effect, as the proper contracts, bonds, certificates, deeds, acts, and writings of the said consolidated corporation, without any surrender or change.

Proviso. Provided always: I. That this consolidation, union, merger, and transfer of rights and liabilities shall not operate, by way of merger or otherwise, to impair, destroy, or extinguish the obligation or liability of any of said parties upon any bonds, contracts, or indebtedness which by these articles, are intended to be transferred to, or which may hereafter be owned by, said consolidated corporation or the lien of any mortgage or other incumbrance which has been executed to secure the payment or performance of any such bonds, contracts, or indebtedness, or the force or obligation of any indenture of lease heretofore entered into by and between any two of the parties hereto, if the continued force of such contracts, or the continued obligation of the parties thereunder, is found necessary to the protection and security of the interests and title of said consolidated corporation or any of the other parties hereto, and the right is hereby expressly reserved to said consolidated corporation, and to such other parties as may be interested in the preservation of such liens or contracts, to enforce, in such manner as it shall be advised, all of said liens or contracts when deemed necessary for such purpose.

2. That the invalidity of any one or more of the conveyances,
29 assignments or transfers intended to be made by the terms of these articles shall not impair or affect the validity of any other.

ARTICLE III.

General purpose and objects. The general purpose and objects of the Chicago, Rock Island and Pacific Railway Company, the consolidated corporation hereby created, shall be:

To own, complete, extend, maintain, and operate. I. To own, complete, extend, improve, maintain, and operate each of the several railroads heretofore owned by any of the parties hereto and hereinafter mentioned, and which are described in the respective charters, articles of association, and articles of consolidation of the several parties (to which, for greater particularity, reference is hereby made), and to use and enjoy all of the corporate and other franchises, rights, privileges, immunities, and property of every nature and description which form a part of, or are appurtenant or relate to any of said railroads, and which have been owned by the respective parties hereto, or by any of them, or by the predecessors, assignors, or grantors of any of them.

The Chicago, Rock Island and Pacific Railroad. I. The railroads heretofore owned by the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, that is to say:

Main line. (I) The main line of the railroad of said company, consisting of what was formerly known as the Chicago and Rock Island Railroad, and which was constructed and operated by

the Chicago and Rock Island Railroad Company, a corporation
30 created by special statutes of the State of Illinois, and extending from Van Buren street, in the city of Chicago, in the county of Cook, in the State of Illinois, through the counties of Cook, Will, Grundy, La Salle, Bureau, Henry, and Rock Island, to a point on the boundary line between the States of Illinois and Iowa, and the railroad formerly known as the Mississippi and Missouri Railroad, which was constructed and operated by the Mississippi and Missouri Railroad Company, a corporation which was created under a general statute of the State of Iowa, from the point on the boundary line last aforesaid, through the counties of Scott, Cedar, Muscatine, Johnson, Iowa, Powesheik, and Jasper, to the town of Kellogg, in said last-named county, and which was completed thence by the party of the first part hereto through said last-named county and the counties of Polk, Dallas, Madison, Guthrie, Adair, Cass, Shelby, and Pottawattamie, to a connection with the Union Pacific Railroad in Council Bluffs, in said last-named county.

The South Chicago branch.

(c 2) The railroad known as the South Chicago branch of the Chicago, Rock Island and Pacific Railroad, and which connects with the main line of said railroad at South Englewood, in the county of Cook and State of Illinois, and extends thence to its eastern terminus in South Chicago, in said county.

And Washington or Oskaloosa branch.

(3) The railroad formerly known as the Washington branch of the Mississippi and Missouri Railroad, and subsequently as the Washington branch and the Oskaloosa branch of the Chicago, Rock Island and Pacific Railroad, which was constructed
31 *a*and operated as a part of said first-named railroad from a point of intersection with the main line of said railroad at Wilton, in the county of Muscatine, to Washington, in the county of Washington, and extended thence, by the party of the first part hereto, through said county and the counties of Keokuk, Mahaska, and Marion to Knoxville, in the last-named county.

The Iowa Southern and Missouri Northern Railroad.

2. The railroads heretofore owned by the Iowa Southern and Missouri Northern Railroad Company, party of the second part hereto, that is to say:

Main line.

(1) The main line of said railroad, extending from its eastern terminus on the boundary line between the States of Illinois and Iowa, at the point where the main line of the Chicago, Rock Island and Pacific Railroad crosses said boundary line, to its western terminus hereinafter described, a portion of which was constructed by the Chicago and Southwestern Railway Company, a corporation which was organized under the laws of the States of Iowa and Missouri, to wit: That portion which extends from a point of intersection with the railroad last above described, at Washington, in Washington County, in the State of Iowa, through said county and the counties of Jefferson, Wapello, Davis, Appanoose, and Wayne, to a point on the boundary line between the State of Iowa and Missouri, thence through the counties of Mercer, Grundy, Davies, DeKalb, Clinton, and Platte, to a point on the Missouri River, at the eastern terminus of the Kansas and Missouri bridge, and nearly opposite the city of Leavenworth, in the State of Kansas.

32 The Atchison Branch.

(2) The railroad constructed by the said Chicago and Southwestern Railway Company and

known as the Atchison branch thereof, which extends from a point of intersection with the line last above described at Edgerton Junction, in the county of Platte, in the State of Missouri, through said county and the county of Buchanan, to a point on the Missouri River opposite the city of Atchison, in the State of Kansas.

And the Indiana and Winterset branch.

(3) The railroad extending from a point of intersection with the main line of the Chicago, Rock Island and Pacific Railroad in Des Moines, in the county of Polk, in the State of Iowa, to a point of intersection with the main line of the Iowa Southern and Missouri Northern Railroad, on the boundary line between the States of Iowa and Missouri, a portion of which, to wit, that which extends from the point of intersection with the Chicago, Rock Island and Pacific Railroad through the counties of Polk and Warren to Indianola, in said last-named county, was constructed by the Des Moines, Indianola and Missouri Railroad Company, a corporation which was organized under the laws of the State of Iowa, and another portion, to wit, that which extends from Somerset Station, on the railroad constructed as last above mentioned, through the counties of Warren and Madison to Winterset, in said last-named county, by the Des Moines, Winterset and South Western Railroad Company, a corporation which was also organized under the laws of the State of Iowa.

The Newton and Monroe Railroad.

3. The railroad heretofore owned by the party of the third part hereto and known as the Newton and Monroe Railroad, which has been constructed from a point of intersection
33 with the main line of the Chicago, Rock Island and Pacific Railroad at Newton, in Jasper County, in the State of Iowa, to Monroe, in said county.

The Atlantic Southern Railroad.

4. The railroad heretofore owned by the Atlantic Southern Railroad Company, the party of the fourth part hereto, extending from a point of intersection with the main line of the Chicago, Rock Island and Pacific Railroad in the city of Atlantic, in the county of Cass, in a southerly direction through Lewis, in said county, to a point on the boundary line between the States of Iowa and Missouri, which railroad has been constructed by said party of the fourth part from the point first named to said town of Lewis.

The Avoca, Macedonia Southwestern Railroad.

5. The railroad heretofore owned by the Avoca, Macedonia and Southwestern Railroad Company, a corporation organized under the laws of the State of Iowa, and party of the fifth part hereto, which is being constructed from a point of intersection with the main line of the Chicago, Rock Island and Pacific Railroad near Avoca, in Pottawatamie County, in the State of Iowa, in a southerly direction to a point on the boundary line between the States of Iowa and Missouri.

The Atlantic and Audubon Railroad.

6. The railroad heretofore owned by the Atlantic and Audubon Railroad Company, a corporation organized under the laws of the State of Iowa, party of the sixth part hereto, which is constructed and in operation from a point of intersection with the main line of the Chicago, Rock Island and Pacific Railroad near Atlantic, in the county of Cass, in the State of Iowa, through the counties of Cass and Audubon to Audibon, in said last-named county.

Leased lines. II. To perform, as the successor and assignee of the lessees in the several indentures of lease hereinafter mentioned, the several indentures of lease hereinafter mentioned, the several covenants, promises, and agreements in said indentures set out to be kept and performed by said several lessees; and to hold, use, and enjoy all franchises, rights, privileges, property, income, and emoluments secured to said lessees by the terms of said several indentures, that is to say:

Peoria and Bureau Valley Railroad. 1. The indenture of lease, made on the fourteenth day of April, in the year one thousand eight hundred and fifty-four, between the Peoria and Bureau Valley Railroad Company, a corporation organized and existing under special statutes of the State of Illinois, as lessor, and the Chicago and Rock Island Railroad Company, as lessee, whereby said lessor did demise and let to the said lessee, its successors and assigns, the railroad of the said lessor, which extends from a point of intersection with the main line of the Chicago, Rock Island and Pacific Railroad at Bureau Junction, in the county of Bureau, in the State of Illinois, through a portion of said county and the counties of Putnam, Marshal, and Peoria to Peoria, in the last-named county, with all of the franchises, rights, privileges, and property forming a part thereof and appurtenant thereto, which railroad and appurtenant property is more particularly described in said indenture.

35 The Keokuk and Des Moines Railway. 2. The indenture of lease made on the fourteenth day of May, in the year one thousand eight hundred and seventy-eight, between the Keokuk and Des Moines Railway Company, a corporation organized under the laws of the State of Iowa, as lessor, and the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, as lessee, whereby said lessor did let and demise to the said lessee, its successors and assigns, the railroad known as the Keokuk and Des Moines Railway, which extends from one terminus in the city of Keokuk, in the county of Lee, in the State of Iowa, through the counties of Lee, Van Buren, Davis, Wapello, Mahaska, Marion, Jasper, and Polk, to a terminus on the west side of the Des Moines River, in the city of Des Moines, in said last-named county, together with all of the franchises, rights, privileges, and property forming a part of and appurtenant to said railroad and in said indenture described.

Fort Leavenworth Railroad. 3. The indenture of lease made on the twenty-fourth day of June, in the year one thousand eight hundred and seventy-eight, between the Fort Leavenworth Railroad Company, a corporation organized and existing under the laws of the State of Kansas, as lessor, and the Iowa Southern and Missouri Northern Railroad Company, party of the second part hereto, as lessee, whereby said lessor let and demised to said lessee the railroad known as the Fort Leavenworth Railroad, which extends from the western terminus of the Kansas and Missouri Bridge on the Fort Leavenworth military reservation, in the county of Leavenworth, in the State of Kansas, through said *said* reser-

36 vation to the city of Leavenworth in said county, with all of the franchises, rights, privileges, and property appurtenant to said railroad and in said indenture described.

Avoca, Harlan, and Northern Railroad. 4. The indenture of lease made on the fourteenth day of September, in the year one thousand eight hundred and seventy-eight, between the Avoca, Harlan, and Northern Railroad

Company, as lessor, and the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, as lessee, whereby the said lessor let and demised to the said lessee, its successors and assigns, its railroad which is constructed and in operation from a point of the main line of the lessee, near Avoca, in Pottawattamie County, in the State of Iowa, through said county and the county of Shelby, to Harlan, in said last-named county, with all franchises, rights, privileges, and property, forming a part of and appurtenant to said railroad in said indenture described.

Guthrie and Northwestern Railroad.

5. The indenture of lease made on the sixth day of February, in the year one thousand eight hundred and eighty, between the Guthrie and Northwestern Railroad Company, as lessor, and the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto. as lessee, whereby the said lessor let and demised to said lessee the railroad now being constructed from a point on the main line of said lessee near Guthrie Station, in the county of Guthrie, to Guthrie Center, in said county, with all of the franchises, rights, privileges, and property forming a part of or appurtenant to said railroad and in said indenture described.

37

Hannibal and St. Joseph Railroad.

6. The indenture of lease made on the fourth day of December, in the year one thousand eight hundred and seventy-nine, between the Hannibal and St. Joseph Railroad Company, as lessor, and The Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, and the Iowa Southern and Missouri Northern Railroad Company, party of the second part hereto, as lessees whereby said lessor let and demised to said lessees certain rights, privileges, and franchises in and upon that branch of the lessor's railroad which extends from Cameron, in Clinton County, in the State of Missouri, through the counties of Clinton, Clay, and Jackson to Kansas City, in said last-named county, which rights, privileges, and franchises are in said indenture described.

Keosauqua and Southwestern Railroad.

7. The indenture of lease made on the first day of May, in the year one thousand eight hundred and eighty, between the Keosauqua and Southwestern Railroad Company, a corporation organized and existing under the laws of the State of Iowa, as lessor, and the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, as lessee, whereby the said lessor let and demised to said lessee its railroad which is now being constructed from an intersection with the Keokuk and Des Moines Railway at Mount Zion, in the county of Van Buren, in the State of Iowa, to Keosauqua, in said county.

Running and traffic arrangements.

Also to observe, keep, and perform as the successor and assignee of the party of the first part, the several covenants and promises by said party agreed to be kept and performed,

38

in any and all agreements for running or traffic arrangements entered into between it and any other railroad company or companies.

Lateral lines and bridges.

III. To construct or acquire by purchase or lease railroads lateral to any of the several lines hereby consolidated and to maintain and operate the same as parts of its railway system. Also to construct or acquire by purchase or lease and maintain and operate railway bridges over navigable rivers and waterways, when necessary

to the extension or connection of any of the railroads hereby consolidated, or of any other railroads lateral thereto and owned or leased by said consolidated corporation.

Land-grant lands.

IV. To own, use, sell, or otherwise dispose of all lands which have been or may hereafter be certified by the proper officers of the United States to the State of Iowa, the Mississippi and Missouri Railroad Company, or the Chicago, Rock Island and Pacific Railroad Company, or which have been confirmed to either of said companies, or to which either is or may be entitled because of any legislation of the United States or of the State of Iowa, in or supplemental to the act of Congress entitled "An Act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved on the fifteenth day of May, in the year one thousand eight hundred and fifty-six, and the act amendatory thereof, approved on the second day of June, in the year one thousand eight hundred and sixty-four, as fully as the same could be owned, used, sold, or otherwise disposed of by the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto.

39 ARTI'LE IV.

Powers of the consolidated corporation.

The Chicago, Rock Island and Pacif'c Railway Company, the consolidated corporation hereby created, shal have and possess:

Of constituent members assumed.

1. Each and all of the corporate and other franchises, rights, powers, privileges, immunities, and property heretofore held, possessed, exercised or enjoyed by the said parties of the first, second, third, fourth, fifth, and sixth parts hereto, or by either of them, including all franchises, privielges and immunities secured to each by its charter or charters, articles of incorporation, articles of association, articles of consolidation, and the laws of any State or of the United States.

Proviso.

Provided, that if the consolidation, union and merger intended to be accomplished by the execution of these articles shall be held ineffectual or invalid as to any one or more of the parties, they shall nevertheless be effectual and valid as to all parties having power to make such consolidation, union and merger.

2. Such powers as may be necessary to the accomplishment of the purposes and objects declared in the third article hereof, and which it may legally assume and exercise as a consolidated corporation in each of the several States in which any part of the railroads, which it will own or operate, is or may be situated, or into which any of said railroads may be lawfully extended.

To extend existing franchises.

3. Power to renew and extend, in such manner as may be provided by law, its own corporate being, existence,
40 and franchises, and the existence of the corporate franchises, rights, privileges, and immunities hereby consolidated, united, and merged if such extension and renewal shall at any time be deemed necessary to prevent the expiration of the same.

General corporate powers.

4. Power to sue and be sued in its corporate name; have a corporate seal and alter the same at pleasure; do

any act or transact any business which a common carrier of persons and property may lawfully do; make contracts, acquire and transfer property; establish by-laws and make such rules and regulations as may be deemed necessary to the proper management of its business.

ARTICLE V.

Capital stock.

1. The capital stock of the Chicago, Rock Island and Pacif'c Railway Company, the consolidated corporation hereby created, shall be limited to the sum of fifty million dollars, until the amount thereof is increased by an amendment of these articles of consolidation, adopted in the manner provided in the thirteenth article hereof. The said caiptail stock shall be divided into shares each of which shall have a par value of one hundred dollars.

Stockholders of the constituent companies and of the consolidated corporation.

2. All of the holders of the capital stock of the parties of the first, second, third, fourth, fifth, and sixth parts hereto shall henceforth be stockholders in the said consolidated corporation, in like proportional amounts, and with the same rights and liabilities between them severally and the said consolidated corporation as now exist between them and the several parties hereto.

41 Issuance of certificates.

3. Each shareholder in the consolidated corporation shall be entitled to receive for his entire interest, legal and equitable in the capital stock of each and every of the parties hereto, shares of the capital stock of the consolidated corporation equal to twice the number of shares represented by the certificates, which shall be surrendered by him for capital stock of the party of the first part. The certificates for the shares of the capital stock of the consolidated corporation shall be issued to the persons entitled thereto, only upon the surrender by them of the certificates held by them for the capital stock of the party of the first part.

ARTICLE VI.

Board of directors.

1. The affairs of the Chicago, Rock Island and Pacific Railway Company, the consolidated corporation hereby created, shall be under the general control of a board of thirteen directors,

By whom elected.

who shall be elected by the stockholders from their own number.

Classification.

2. The directors shall be divided into three classes, two of which shall consist of four directors each, and one of five.

When elected.

When elected, term.

3. At each annual election the stockholders shall elect, by ballot, for a term of three years and until their successors are elected, a number of directors equal to the number in the class whose term expires on the day fixed for the annual meeting, at which such election should be had. If for any reason an election is not had at any annual meeting or an adjournment thereof,

Special elections.

42 a special meeting for such election may be called in the manner provided by the by-laws.

Filling vacancies. 4. Vacancies occasioned by the removal of a director from office by death, resignation or otherwise than by an expiration of the term for which he was elected, may be filled by the board of directors, in such manner as shall be provided by the by-laws.

Resignation. 5. Ceasing to be a stockholder in the corporation shall be taken and regarded as a resignation.

Duties of the board—to elect president, two vice-presidents, secretary, and treasurer. 6. It shall be the duty of the board of directors: (1) To elect annually at their first meeting held after the stockholders' annual meeting, one president, two vice-presidents, one secretary, and one treasurer, and when in the judgment of the board, it is necessary, one assistant secretary and one assistant treasurer.

To fill vacancies. (2) To fill vacancies in the offices above named, and in the board, except when caused by the expiration of a term of a director.

To adopt by-laws. (3) To adopt by-laws fixing the time and place for the annual meetings of the stockholders, for the election of directors, and the transaction of other business; providing for the appointment of such officers, in addition to those named in the preceding paragraph, as may be deemed necessary for the transaction of the business of the corporation, and prescribing such additional rules and regula-
43 tions as may be deemed proper for observance in the transaction of the business and protection of the interests of the corporation.

General powers of the board of directors. 7. All powers which are not, by the terms of these articles, or by statute, vested in or to be exercised by the stockholders, are hereby conferred upon and vested in the board of directors.

Executive committee. 8. The board of directors may appoint an executive committee, which shall consist of the president of the corporation and four directors, and invest it with all of the powers of the board when it is not in session.

First board of directors. 9. The persons who, at the time of the execution of these articles, are directors of the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, shall be the directors of the said consolidated corporation during the full duration of the several terms for which they were elected by the stockholders of the said party of the first part, and until their successors are duly chosen.

The officers of the consolidated corporation. 10. The several officers of the party of the first part, at the date of the execution of these articles, shall be the like officers of said consolidated corporation during the pleasure of the board of directors or of such officer or officers as shall be invested with power to appoint and remove.

ARTICLE VII.

Ratification. All and singular the proceedings, resolutions, and doings of the respective boards of directors of the respective first, second, third, fourth, fifth, and sixth parties hereto
44 and of the several executive committees of said parties are hereby ratified, confirmed, and declared valid, and shall be observed and kept by said consolidated corporation.

ARTICLE VIII.

Limit of indebtedness.

The highest amount of indebtedness to which said consolidated company may at any time subject itself, shall not exceed two-thirds of the par value of the shares of its capital stock outstanding.

ARTICLE IX.

Commencement of existence of consolidated corporation.

The existence of the consolidated corporation shall commence on the first day on which the certificates required by law, showing the approval by the required majority of the stockholders of each of the parties hereto of the proposition to creat' said consolidated corporation, are on file in the offices of the secretary of state for the State of Illinois, the recorder of Cook County, in said State, the secretary of state for the State of Iowa, and the recorder of Scott County, in said State, and shall continue for a period of fifty years thereafter, which existence may be renewed from time to time as may be provided by the laws of the States of Illinois and Iowa.

ARTICLE X.

Private property exempt.

The private property of the stockholders of the consolidated corporation shall not be liable for corporate debts.

ARTICLE XI.

45

General and other offices.

The principal place of business and general offices of said consolidated corporation shall be in the city of Chicago, in the State of Illinois. Its principal place of business in the State of Iowa shall be in the city of Davenport, in the county of Scott, in said State. It may also establish and maintain an office in the city of New York.

The board of directors and executive committee may hold meetings at such places as they may deem proper, and all acts done and resolutions made at such meetings shall have the same force and validity as if done or made at the general office of the company in the city of Chicago.

ARTICLE XII.

First by-laws.

The by-laws of the Chicago, Rock Island and Pacific Railroad Company, party of the first part hereto, shall, so far as they are consistent with these articles, be the by-laws of the said consolidated corporation, until otherwise ordered by the board of directors.

ARTICLE XIII.

Amendment of articles of consolidation.

These articles, or any of them, may be amended at any annual meeting of the stockholders of said consolidated corporation, or at any special meeting called for that purpose by the vote of the holders of two-thirds of the shares of capital stock then outstanding.

In witness whereof the said parties have severally impressed hereon their respective corporate seals and have caused the same to be attested by the signatures of their several presidents and secretaries, the day and year first above written.

[L. S.] HUGH RIDDLE,
46 *President of the Chicago, Rock Island and Pacific Railroad Company.*
FRANCIS H. TOWS,
Secretary of the Chicago, Rock Island and Pacific Railroad Company.
F. H. GRIGGS,
President of the Iowa Southern and Missouri Northern Railroad Company.
[L. S.] J. L. DREW,
Secretary of the Iowa Southern and Missouri Northern Railroad Company.
[L. S.] F. H. GRIGGS,
President of the Newton and Monroe Railroad Company.
[L. S.] D. S. COUCH,
Secretary of the Newton and Monroe Railroad Company.
H. F. ROYCE,
President of the Atlantic Southern Railroad Company.
[L. S.] THOS. S. WRIGHT,
Secretary of the Atlantic Southern Railroad Company.
JOHN T. BALDWIN,
President of the Avoca, Macedonia and South Western Railroad Company.
[L. S.] S. S. STEVENS,
Secretary of the Avoca, Macedonia and South Western Railroad Company.
A. KIMBALL,
President of the Atlantic and Audubon Railroad Company.
[L. S.] J. L. DREW,
Secretary of the Atlantic and Audubon Railroad Company.

47 UNITED STATES OF AMERICA,
State of Illinois, ss:

OFFICE OF SECRETARY.

I, Isaac N. Pearson, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of the articles of consolidation of the Chicago, Rock Island and Pacific Railway Company, the original of which was filed for record in this office on the 4th day of June, A. D. 1880, and duly recorded in book 3 at page 160 of railroad records.

In witness whereof I hereto set my hand and affix the great seal of State at the city of Springfield this 27 day of March, A. D. 1889.

I. N. PEARSON,
Secretary of State.

[Seal of the State of Illinois.]

UNITED STATES OF AMERICA,
State of Iowa:

I, Frank D. Jackson, secretary of state of the State of Iowa, do hereby certify that the foregoing printed instrument is a true and correct copy of the "articles of consolidation" made and entered into June 2, 1880, by and between the Chicago, Rock Island and Pacific Railroad Company, party of the first part, the Iowa Southern and Missourie Northern Railroad Company, party of the second part, the Newton and Monroe Railroad Company, party of the third part, the Atlantic Southern Railroad Company, party of the fourth part, the Avoca,
48 Macedonia and Southwestern Railroad Company, party of the fifth part, and the Atlantic and Audubon Railroad Company, party of the sixth part, as the same appears of record in this office, which instrument, as is shown by the record in this office, was filed therein for record on the third day of June, A. D. 1880, and recorded in book K, pages 375–390, of the record of said office.

In testimony whereof I have hereunto set my hand and affixed the seal of the secretary of state of the State of Iowa.

Done at Des Moines, the capital of the State, this first day of April, in the year of our Lord one thousand eight hundred and eighty-nine, of the Independence of the United States the one hundred and thirteenth, and of the State of Iowa the forty-third.

FRANK D. JACKSON,
Secretary of the State of Iowa.

[The great seal of the State of Iowa.]

(Endorsed:) Filed Oct. 6, 1890. Wm. H. Bradley, clerk.

Afterwards, to wit, on the seventh day of January, 1891, came the plaintiffs, by the United States attorney, and filed in the clerk's office of said court in said entitled cause its demurrer to the plea of defendant, which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
49 *Northern division of the northern district of Illinois, ss:*

In the circuit court of the United States for the northern division of the northern district of Illinois.

UNITED STATES OF AMERICA *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company.	Assumpsit.

And the plaintiffs as to the plea of the defendant by it secondly above pleaded say that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar their, the plaintiffs, from having their aforesaid action, and that they are not bound by law to answer the same, and this they are ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment and their damages, etc., to be adjudged to them, etc.

THOMAS E. MILCHRIST,
United States Attorney.

(Endorsed:) Filed Jan'y 7, 1891. Wm. H. Bradley, clerk.

On the same day, to wit, the seventh day of January, 1891, came the plaintiff, by the United States attorney, and filed in the clerk's office of said court its similiter, which said similiter is in the words and figures following, to wit:

50 *Similiter.*

UNITED STATES OF AMERICA,
Northern division of the northern district of Illinois, ss:

In the circuit court of the United States for the northern division of the northern district of Illinois.

UNITED STATES OF AMERICA
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company. } Assumpsit.

And the plaintiff as to the plea of the defendant by it first above pleaded and whereof it has put itself upon the country does the like.

THOMAS E. MILCHRIST,
United States Attorney.

(Endorsed:) Filed Jan'y 7, 1891. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-seventh day of February, 1893, in the December term of said court, 1892, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

UNITED STATES
vs.
THE CHICAGO, ROCK ISLAND AND
51 Pacific Railroad Company. } Assumpsit.

Now come the parties by their attorneys and comes on to be heard the demurrer to the plea herein, and the court, having heard the arguments thereon, takes the matter under advisement.

Afterwards, to wit, on the tenth day of November, 1893, there was filed in the clerk's office of said court in said entitled cause the opinion of Judge Grosscup, which said opinion is in the words and figures following, to wit:

Opinion.

UNITED STATES
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILway Company.

GROSSCUP, J.:

This is an action on the part of the United States to recover from the defendant railway company for the use of the bridge across the Mississippi River, between Rock Island, in the State of Illinois, and Daven-

port, in the State of Iowa. The declaration is based upon a special act of Congress providing for the ascertainment of the rentals due for the use of the bridge, and upon the alleged fact that the defendant
52 railway company has been transporting freights from the Illinois to the Iowa side of the river for the Chicago, Burlington and Quincy Railroad and other railway companies, for which it has been receiving compensation, and seeks to recover, under the special act of Congress, the proportion of such compensation received which the same bears to the respective outlays of the Government and the railway company. The act of Congress, and the declaration based upon it, seeks to recover these receipts on the part of the defendant railway company as rentals for the use of the bridge, which belonged properly to both the Government and the company in the proportion of their respective interests.

The defendant railway company pleads a contract between it and the United States, which, in substance, provided that the United States and defendant company should jointly build the bridge, each bearing a certain proportion of the expenses thereof; that the fee of the bridge should always remain in the United States; but that the defendant company should have forever a right of way over the same as a common carrier; that any other railway company or common carrier desiring to use the bridge could have the privilege of so doing upon coming into the enterprise on the same terms as the defendant railway company; that the money received from such new user and occupier should be paid to the United States and the defendant company in the respective proportions of their outlay on account of the contract; that the defendant railway company has been carrying the freight and cars of the Chicago, Burlington and Quincy Railway Company from Rock Island to Davenport in the course of its business as a common carrier; and that the said freight and cars were tendered to the defendant as such common carrier for car-
53 riage, and that their carriage was in the line of its business as a common carrier, whence it is urged that the defendant company has only received this compensation as a common carrier in pursuance of its right under the contract to a right of way across said bridge.

To this plea the United States has filed a demurrer.

There is nothing in the pleadings which charge that the defendant company has resorted to this matter of transporting freight or cars for the Chicago, Burlington & Quincy Railroad in order to defraud the Government or avoid the terms of the contract.

The demurrer to the plea admits that the defendant company was tendered and received, in good faith, these cars as a common carrier for carriage across the bridge.

The question raised by the demurrer, therefore, is whether the acceptance and carriage of these freights and cars is properly within the business of the railway company as a common carrier, and therefore within its right, under that clause of the contract, which gives it a free right of way across the bridge. It was admitted on the argument that, under the law of Illinois one railway company can rightfully tender its cars to another company for carriage on the tracks of the other company, and that a refusal of such tender can not lawfully be made. This seems to me to fully answer the question raised by the demurrer. If railway companies are obliged to carry the cars of other companies tendered to them, then

such carriage is clearly within their business as common carriers, and if that were the law when the contract between the defendant company and the United States was entered into, it must be regarded as having
54 been in contemplation when that clause of the contract relating to a free right of way as a common carrier was inserted and agreed upon.

For the foregoing reasons the demurrer is overruled.

P. S. GROSSCUP.

(Endorsed:) Filed Nov. 10, 1893. S. W. Burnham, clerk.

On the same day, to wit, the tenth day of November, in the October adjourned term of said court, 1893, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Now come the parties, by their attorneys, and the court having considered and being now fully advised upon the demurrer to the plea herein, overrules the same.

Whereupon the plaintiff elects to abide by its demurrer, and objects and excepts to the ruling of the court. It is thereupon considered and adjudged that this cause be dismissed at plaintiff's costs.

Afterwards, to wit, on the nineteenth ay of January, 1894, came the plaintiff, by the United States attorney, and filed in the clerk's office
55 of said court its petition for writ of error, which said petition for writ of error is in the words and figures following, to wit:

Petition for writ of error.

In the circuit court of the United States of America for the northern district of Illinois, northern division; of the December term, A. D. 1893.

THE UNITED STATES OF AMERICA
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, a corporation, &c. — Gen. No. 21741.

Petition for a writ of error.

To the honorable Peter S. Grosscup, judge of the district court of the United States of America for the northern district of Illinois.

Now come the United States of America, by Thomas E. Milchrist, attorney of the said United States for the northern district of Illinois, and for the said United States prays that a writ of error may issue in the above-entitled cause from the Supreme Court of the said United States to the said circuit court.

THOMAS E. MILCHRIST,
United States Attorney.

(Endorsed:) Filed Jan. 19, 1894. S. W. Burnham, clerk.

56 On the same day, to wit, the nineteenth day of January, 1894, came the plaintiff in said entitled cause by the United States attorney and filed in the clerk's office of said court its assignment of errors, which said assignment of errors is in the words and figures following, to wit:

Assignment of errors.

In the circuit court of the United States of America for the northern district of Illinois, northern division; of the December term, in the year of our Lord eighteen hundred and ninety-three.

THE UNITED STATES OF AMERICA *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, a corporation, etc.	Gen. No. 21741. Assumpsit.

Assignment of errors.

Afterwards, to wit, on the nineteenth day of January, in this same term, come the said United States of America, by Thomas E. Milchrist, their attorney, for the northern district of Illinois, and say that in the foregoing record and proceedings there is manifest error in this, to wit:

I.

That the said circuit court erred in overruling the demurrer of the said United States, filed herein on the seventh day of January, A. D. 1891, to the second plea of the said de'endant, filed herein on the sixth
57 day of October, A. D. 1890, and in ordering the dismissal of the case at the plaintiff's costs.

II.

The said court erred in not sustaining the said demurrer to the said second plea.

III.

The said court erred in overruling the said demurrer and thereby giving no effect to section two of the act of Congress approved March third, eighteen hundred and eighty-one, and entitled "An act making appropriations for the construction, completion, repair, and preservation of certain works on rivers and harbors, and for other purposes."

IV.

The court erred in overruling the said demurrer on the ground that the said section of the said act of Congress is unconstitutional and void.

V.

The court erred in overruling the said demurrer on the ground that the said act of Congress is unconstitutional and void, because it impairs the obligation of the said United States under the several contracts heretofore entered into between the said United States and the said defendant pertaining to the several matters involved in this suit.

58

VI.

The court erred in not sustaining the said demurrer on the ground that the said second plea and the matters therein contained were insufficient in law to bar the said United States from having their aforesaid action, in view of the existence of the said section of the said act of Congress.

VII.

The court erred in deciding that the said defendant, being a common carrier, and as such required to transport property of other common carrie's over and across the bridge mentioned in the foregoing record, when such property should be tendered to it, could not be required to account to the said United States for any portion of the toll received by the said defendant for such services.

THOMAS E. MILCHRIST,
U. S. Attorney.

(Endorsed:) Filed Jan. 19, 1894, S. W. Burnham, clerk.

On the same day, to wit, the nineteenth day of January, 1894, in the December term of said court, 1893, in the record of proceedings thereof in said entitled cause before the Hon. William H. Seaman, district judge, appears the following entry, to wit:

59 THE UNITED STATES OF AMERICA
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Company.

Upon the petition of the plaintiff herein it is ordered by the court that a writ of error issue herein to the Supreme Court of the United States.

60 NORTHERN DISTRICT OF ILLINOIS,
Northern Division, ss:

I, S. W. Burnham, clerk of the circuit court of the United States, for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein the United States of America are the plaintiffs and Chicago, Rock Island and Pacific Railroad Company is the defendant, as the same appears from the original records and files of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 6th day of February, A. D. 1894.

[SEAL.] S. W. BURNHAM,
Clerk.

61 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between the

United States of America, plaintiff, and Chicago, Rock Island and Pacific Railroad Company, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said The United States of America, plaintiff, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventeenth day of February, A. D. 1894, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of January, in the year of our Lord one thousand eight hundred and 94, and of the independence of the United States the 118th year.

[SEAL.]

S. W. BURNHAM,
Clerk U. S. Circuit Court Nor. Dist. Ill.

(Indorsed:) Supreme Court of the United States. United States of America, plaintiff in error, vs. Chicago, Rock Island and Pacific Railroad Company, defendant in error. Writ of error.

62 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the Chicago, Rock Island and Pacific Railway Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., on the seventeenth day of February, A. D. 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the United States of America are plaintiffs and you are defendants, to show cause, if any there be, why the errors mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Peter S. Grosscup, judge, this 19th day of January, in the year of our Lord, one thousand eight hundred and 94.

P. S. GROSSCUP.

Accepted February 2nd, 1894.

ROBT. MATHER,
N. P.

(Indorsed on cover:) Case No. 15507. Term No. 642. N. Illinois C. C. U. S. The United States, plaintiff in error, vs. Chicago, Rock Island and Pacific Railroad Company. Filed February 13th, 1894.

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164-702

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164-705

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.
No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.
No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

This was an action of assumpsit brought to the October term, 1890, of the circuit court of the United States for the northern district of Illinois, by the United States against the Chicago, Rock Island and Pacific Railroad Company, to recover "the amount of tolls received by the defendant for the use of the plaintiffs, as tolls upon * * * cars carrying freight (other than those passing over the road of the defendant, and for the cars of defendant when carrying freight for other roads) carried, transported, and conveyed by the defendant before that time over the railroad bridge of the plaintiffs, constructed and located at and over the Mississippi River at the

island of Rock Island in said river, to connect the said island with the cities of Davenport and Rock Island."

The bill of particulars filed with the declaration shows that the amount of tolls demanded by the United States had been collected by the defendant from certain railroad companies therein mentioned, with the amounts received from each company.

To the declaration of plaintiffs, the defendant on the 6th of October, 1890, filed two pleas, to wit: plea of *non assumpsit* and a special plea in which is recited certain acts of Congress authorizing the construction of the bridge by the United States and prescribing the terms on which the right of way over said bridge should be granted to the defendant—the written acceptance by the defendant of the right of way, upon the terms prescribed, with its guaranty to fulfill the conditions prescribed—and certain articles of consolidation entered into between the defendant and certain other railroad companies therein named, said special plea concluding as follows:

> And defendant avers that by virtue of said articles of consolidation the right of said Chicago, Rock Island and Pacific Railroad Company to the perpetual and free use of said bridge, as aforesaid, passed to and became vested in this defendant as fully and to the same effect as the same had theretofore existed in favor of the said Chicago, Rock Island and Pacific Railroad Company.
>
> And defendant avers that by virtue of the said articles of consolidation it did, on the said 2d day of June, A. D. 1880, take possession of the railroad of said Chicago, Rock Island and Pacific Railroad Company, including that portion of its said railroad so constructed over, upon, and across

the bridge aforesaid, and has ever since continued to operate the same in the transaction of its business and the performance of its duties as a common carrier of goods and passengers, and that said portion of its railroad so constructed over, upon, and across said bridge as aforesaid is a necessary part of its continuous system of railroad extending from points in the State of Illinois to points in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, and the Indian Territory. And in the performance of its duties as a common carrier as aforesaid, defendant is compelled to receive and does receive at connecting points upon its line near the respective termini of said bridge in the cities of Rock Island, State of Illinois, and Davenport, State of Iowa, cars of other roads carrying freight and destined to points on said roads beyond said bridge, or destined for delivery at the further terminus of said bridge, and is likewise compelled to receive and does receive in its own cars, at said connecting points, freight to be carried across said bridge for other roads, and defendant avers that in the course of its business and in the performance of its duties as a common carrier as aforesaid it has received from time to time from the said railroad companies in said declaration mentioned, at said connecting points near the respective termini of said bridge, cars of said other railroads carrying freight, and has carried the same across said bridge, and has in like manner transported its own cars carrying freight for said other roads across said bridge, and that the said several supposed cars in the said declaration mentioned, if any of the same were carried by the defendant over the bridge of the plaintiff aforesaid, were so carried by defendant in the regular course of its business and in the performance of its duties as a common carrier as aforesaid, and this the defendant is ready to verify.

To the plea of *non assumpsit* the plaintiff on January 7, 1891, replied generally, and issue was thereupon joined. (Rec., p. 25.)

To the special plea the plaintiff demurred, and defendant joined on demurrer.

On November 10, 1893, the court overruled the demurrer, and the following order was thereupon entered by the court:

* * * * *

> Whereupon the plaintiff elects to abide by its demurrer, and objects and excepts to the ruling of the court. It is thereupon considered and adjudged that this cause be dismissed at plaintiff's cost.

The issue joined on the plea of *non assumpsit* remained undisposed of.

The defendant could not plead specially any matter of defense which might have been offered under the general issue. If the matter set up in the special plea was covered by the general issue, the special plea should have been stricken out, and the demurrer should, for this purpose, have been treated as an exception to the plea. The plaintiffs had the right to a trial before a jury on the general issue, although they might choose to abide by their demurrer to the special plea.

THE DEMURRER TO THE SPECIAL PLEA SHOULD HAVE BEEN SUSTAINED.

Admitting the facts set forth and properly pleaded, yet does the plea present no ground of defense to the plaintiffs' action.

The plaintiffs' demand is for money had and received by the defendant, for the use of the plaintiffs, from tolls collected by defendant from certain railroad companies whose cars defendant had carried across the river *upon the bridge of the plaintiffs*. The declaration expressly excepts from its demand any tolls collected by defendant from cars "passing over the road of the defendant and for the cars of the defendant when carrying freights for other roads." Yet the defendant, by its special plea, does not deny that it did carry over said bridge cars other than those expressly excepted in the declaration, or that it collected tolls from the railroad companies for whom it carried such cars. It contents itself with the averment in its special plea—

> That the said several supposed cars in the said declaration mentioned, if any, of the same were carried by the defendant over the bridge of the plaintiff aforesaid, were so carried by defendant in the regular course of its business and in the performance of its duties as a common carrier as aforesaid, and this the defendant is ready to verify.

Two classes of cars are mentioned in the declaration; one, the class the tolls for which the plaintiffs demand that the defendant shall account to them; the other, the class expressly excepted in the plaintiffs' declaration. To which of these classes the defendant's special plea was intended to apply is by no means apparent, but remains doubtful and uncertain.

The plaintiffs' demand applies only to cars "other than those passing over the road of the defendant, and for the cars of the defendant when carrying freight for other roads."

The defendant's special plea avers only that—

> Defendant is compelled to receive and does receive at connecting points upon its line, near the respective termini of said bridge * * * cars of other roads carrying freight and destined to points *on said roads* beyond said bridge, or destined for delivery at the further terminus of said bridge, and is likewise compelled to receive in its own cars at said connecting points freight to be carried across said bridge for other roads.

It further avers that—

> It has received from time to time from the said railroad companies in said declaration mentioned, at said connecting points near the respective termini of said bridge, cars of said other railroads carrying freight, and has carried the same across said bridge; and has in like manner transported its own cars, carrying freight for said other roads, across said bridge, etc.

Here is no denial of the charge that it has carried across the bridge cars other than those excepted in the declaration, nor any confession of such charge, except in the vague and ambiguous language that "it has received from time to time from the said railroad companies in said declaration mentioned, at said connecting point near the respective termini of said bridge, cars of said other railroads carrying freight, and has carried the same across said bridge." It does not aver, and could not truthfully aver, that the railroad companies in said declaration mentioned did connect at any point with defendant's line of railroad. Indeed, in immediate connection with the language above quoted (Rec., p. 8), it avers that—

> Defendant is compelled to receive, and does receive, at connecting points upon its line near the respective

termini of said bridge, *in the cities of Rock Island, State of Illinois, and Davenport, State of Iowa*, cars of other roads carrying freight and destined *to points on said roads* beyond said bridge or destined for delivery *at the farther terminus of said bridge.*

From which it is manifest that the railroad companies in the declaration mentioned are railroads converging to the cities of Davenport and Rock Island, and from which, in said cities, the defendant receives the cars and freight, not for carriage and conveyance over and along its railroad, but only and merely for conveyance across plaintiffs' bridge.

We submit, then, on this plea—

1. That it is not in the nature of a confession and avoidance, because it does not confess the charge in the plaintiffs' declaration made, while it seeks, by vague, obscure, and ambiguous language to convey that impression. It does confess that it received and carried cars embraced in the excepted class mentioned in plaintiffs' declaration; but as to the other class, for which the declaration demands the tolls that defendant received, it avers that it has received "from the said railroad companies in said declaration mentioned * * * cars of said *other* railroads carrying freight," etc.

It is for tolls received from railroad companies mentioned in the declaration, and not for "cars of said *other* railroads," that the demand is here made.

2. That while it may be true that the defendant, in performance of the obligation imposed upon it as a common carrier by the law, was compelled to receive and did receive cars and freight delivered to it for carriage by other railroad companies, and has collected from

such railroad companies tolls for carrying cars and freight across the bridge of plaintiffs, yet the law does not impose upon the defendant the obligation or even permit it to retain and apply to its own use the tolls which it has collected from other common carriers for the use of plaintiffs' bridge.

II.

THE RIGHT OF WAY ACQUIRED BY THE DEFENDANT COMPANY UNDER THE GRANT FROM THE UNITED STATES DOES NOT ALLOW DEFENDANT TO FARM OUT SUCH RIGHT TO OTHERS FOR HIRE OR TOLL.

By the act approved March 2, 1867, an appropriation was made for the erection of a bridge at Rock Island, Ill., "*Provided*, That the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, * * * shall have the free use of said bridge for purposes of transit, but without any claim to ownership thereof."

By joint resolution, approved July 20, 1868, it was provided:

> That the ownership of said bridge shall be and remain in the United States; and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, etc. * * * *And provided, further*, That the Government may permit any other road or roads wishing to cross on said bridge to do so by paying to the parties then in

> interest the proportionate cost of said bridge and securing to be paid its proportionate cost of keeping the same in repair. But no such permission to other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company.

In its contract of guaranty the defendant describes the grant as follows (Rec., p. 11):

> which grant shall not authorize the company to erect any structures upon the land so granted, except the railroad tracks necessary for its business; nor to use said land for other purposes than the construction and keeping in repair of its necessary tracks and the passage of *its* trains, etc.

This is a grant by the United States of a valuable privilege to the defendant company. To ascertain its legal effect resort must be had to the entire course of legislation which must be taken together, and to the language of the guaranty which constitutes one of the elements of the grant. And in seeking for the true construction of the whole it should be borne in mind that every grant from the sovereign authority is to be construed strictly against the grantee and in favor of the Government.

> *Hannibal and St. J. R. R. Co.* v. *The M. R. Packet Co.*, 125 U. S., 260.

In *Winona, etc.*, v. *Barney*, 113 U. S., 625, this court, speaking of grants of public lands, said:

> And they are to receive such a construction as will carry out the intent of Congress, however difficult it may be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look

to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.

The language of the act of March 2, 1867, is:

> The Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, * * * but without any claim for ownership thereof.

This is repeated in the act approved July 20, 1868, with this significant addition, however:

> That the Government may permit any other road or roads wishing to cross on said bridge to do so by paying to the parties then in interest the proportionate cost of said bridge and securing to be paid its proportionate cost of keeping the same in repair, but no such permission to other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company.

From all which it is manifest, (1) that the United States retained to themselves the absolute and exclusive ownership of said bridge; (2) that they granted to the defendant company the right to use said bridge for the purposes of its railway; and (3) that they reserved to themselves the right to grant similar rights and privileges to other railroad companies who might desire the use of such bridge for conveyance of their cars and freight.

Of course no railroad companies could use said bridge except those that had their terminus in the cities of Davenport or Rock Island; or had stations in these cities. If, therefore, it was competent for the defendant company to receive the cars and freight of other companies

at or near the mouth of said bridge, and convey the same across the bridge for toll, under its right of way, the reservation in the acts of Congress to the United States to grant to other companies similar rights of way to that granted to the defendant company would be utterly nugatory and vain.

Such a construction, then, of this grant as the defendant company now claims was clearly not intended or contemplated by Congress.

> Reference is to be had, in construing a grant, to the nature and condition of the subject-matter of the grant at the time of the execution of the instrument and the obvious purposes which the parties had in view in making it.
>
> Washburn on Easements, 4th ed., 254.
>
> The term "way" includes neither land nor rents of land, nor profits of land, nor any possessory rights in land; and the owner of the way is not entitled by reason of such ownership to a participation in the rents and profits arising from the land upon which the easement is imposed.
>
> *Wood* v. *Turnpike Co.*, 24 Cali., 488.

Where the right to lay a railroad track was reserved by a mining company, the court enjoined under this reservation a railroad company from doing the ordinary business of a common carrier, and not merely the limited business ordinarily done by a mining company.

> *Riedenger* v. *R. R. Co.*, 62 Mich., 44.
> *Ward* v. *R. R. Co.*, 62 Mich., 48–49.

The right granted here to the defendant company was not a right appendant or appurtenant to any estate, but was a right personal to the grantee alone.

In *Ackroyd* v. *Smith* (10 Com. B., 164) the grant was of the right and privilege to the owners and occupiers of certain premises, and all persons having occasion to resort thereto, "of passing and repassing, *for all purposes*, in, over, along, and through a certain road," etc.

Creswell, J., delivering judgment of the court, said:

> Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them. It is not appurtenant to it. A covenant, therefore, that such a right should be enjoyed would not run with the land.
>
> Washburn on Easements, 4 ed., 12; *Tinicum Fishing Co.* v. *Carter*, 61 Penn., S. Rep., 38; 3 Kent's Com., 420.

The right of way being in gross and not appurtenant can not be assigned.

> *Garrison* v. *Rudd*, 19 Ill., 565.

A way appurtenant to one piece of land can not be used for the benefit of other lands. The owner of the dominant land can not enlarge his easement. If, however, he makes an illegal or excessive use of the way, the owner of the servient land can not interrupt the way to the dominant land, but may sue in trespass or in trespass on the case for the illegal or excessive use of the way.

> *Walter* v. *Gerhard*, 9 Phila. (Penn.), 117, and cases cited; *Brightman* v. *Chapin*, 15 R. I., 167, 168; *Gaines* v. *Miller*, 111 U. S., 397.

It was not competent, then, for the defendant company to farm out for toll to other railroad companies the right

of way granted to it by the United States across their bridge, because that was in violation of the expressed intent of the United States in making the grant and because the granted way being, personal and not appurtenant, could not be assigned in whole or in part.

The entire scheme of the transaction repels the construction which the defendant in error seeks to place upon it. It is true that both parties to the transaction contributed substantially to the erection of the new bridge. But it was an essential term of the contract between them that "The ownership of said bridge shall be and remain in the United States;" and also, "That the Government may permit any other road or roads, wishing to cross on said bridge, to do so, by paying to the parties then in interest the proportionate cost of said bridge and securing to be paid its proportionate cost of keeping the same in repair."

The only right reserved and secured to the railroad company was that it "shall have the free use of said bridge for purposes of transit."

Upon no other terms than these, doubtless, would the United States have consented to engage in the transaction at all.

By reserving to itself exclusively the right to permit any other road or roads to cross on said bridge, by paying the amount stipulated, the United States plainly meant, and both parties clearly intended, that no other road than that of the defendant in error here should enjoy the benefit of said bridge without payment for its use to the United States. No part of the payment for the use of said bridge

by such other road or roads was to be received by the defendant company, but the whole of such receipts was to pass to the United States as its property.

By the construction which the defendant company has given to this contract, and which the circuit court has sustained by overruling the demurrer to the plea, the defendant company has the right to let or assign its restricted easement in this bridge to all the railroads in the country that may desire to have their freight carried over it. It claims the right to carry the cars of all such other railroads, or the contents of such cars, over the bridge under its privilege and to receive the freight and tolls for such carriage. If this construction be sound, then the ownership of the bridge by the United States and the right reserved to them to let out the privilege to other roads for hire are mere mockeries.

The Chicago, Rock Island and Pacific Railroad Company becomes the real owner of the bridge, and it alone enjoys the benefit of letting out the privilege of transit for hire to other roads.

The learned judge who delivered the opinion of the circuit court appears to rest his judgment overruling the demurrer of the Government to defendant's plea on two grounds, both of which, it is respectfully submitted, are untenable. He says (p. 26):

> There is nothing in the pleadings which charge that the defendant company has resorted to this matter of transporting freight or cars for the Chicago, Burlington and Quincy Railroad *in order to defraud the Government or avoid the terms of the contract.*

Certainly not. It would have been bad pleading, perhaps, and certainly bad practice, to have done so.

It is not necessary to the maintenance of an action of assumpsit that the implied contract should rest upon either fraud or covin. It is surely enough that one receive the money of another, whether intentionally or unintentionally, to support an action by the owner for its recovery. There may be—and possibly was here—an honest difference of opinion between these parties as to the legal effect of a contract between them. It may be that the defendant company, or a majority of its board of directors, really thought that it had the right to farm out its privilege to other railroads and retain for its own use the money received from them. No question of fraud or of a purpose to avoid the terms of the contract arises in the case necessarily at all. If, under a proper construction of the whole contract, it be held by this court that the defendant company erred in its view that it had no right to receive or enjoy any use, benefit, profit, or advantage in excess of that which was expressly secured to it in the contract, then the judgment will be that it account to the plaintiff here for the moneys, etc., so unlawfully received by it, and no imputation or charge of fraud or turpitude need be involved in any degree in the matter.

Again (Rec., p. 26), the learned judge says:

> The demurrer to the plea admits that the defendant company was tendered and received in good faith these cars as a common carrier for carriage across the bridge.

And again, we respectfully submit that the demurrer admits nothing of the kind. It admits only those facts to be true which are well pleaded in the plea. It admits no conclusions of law which may result from such facts.

The defendant in its plea (bottom of p. 7) avers that it has become consolidated with certain other railroad corporations, under articles of consolidation which are filed with the plea, and that by virtue of such consolidation the easement enjoyed by the Chicago, Rock Island and Pacific Railroad Company passed under said articles of consolidation to the new creature thereby brought into life as the Chicago, Rock Island and Pacific Rail *Way* Company, and consequently to each of the several railroad corporations which entered into and constituted this new company. And it avers further that, as such rail*way* company, it has taken possession of the Chicago, Rock Island and Pacific Railroad Company, including that portion of its roadway over and upon the said bridge, and has ever since continued to operate the same "as a common carrier of goods and passengers;" and at the end of its plea (Rec., p. 8) it avers that the "said several supposed cars in the said declaration mentioned, if any of the same were carried by the defendant over the bridge of the plaintiff aforesaid, were so carried by defendant in the regular course of its business and in the performance of its duties as a common carrier as aforesaid."

Apart from the *ifs* and the suppositions and other elements of uncertainty in this plea, there is yet no such averment of the fact that the defendant here was acting as a common carrier when it let plaintiffs' bridge to the

other railroad companies for toll and hire, as plaintiffs would be held to admit as true by their demurrer to the plea.

The plea consists in the main of a series of conclusions of law and inferences of fact drawn from the few positive averments of fact which are made in it. We do not admit these conclusions and inferences to be true; we submit that they are plainly untrue.

If A grants to B a personal right of way across A's land, but refuses to make a like grant to C, D, and E, it will hardly be allowed to B to unite in articles of consolidation with C, D, and E, and by calling the joint product F, insist that these very persons to whom A had refused a right of way across his land had now acquired the full, free, and lawful right to use such "way" by virtue of the articles of consolidation, to which A was not a party and by which he can not be bound.

It may be true that the statutes of Iowa and Illinois require railroad companies in those States to carry over their roads the cars and freight of other companies. It may also be true that when several railroad companies become united under articles of consolidation the joint company receives and enjoys all the property rights, privileges, and benefits theretofore held and enjoyed by each of its constituent parts.

But these statutes and rules of law can not be perverted or misapplied to the destruction or impairment of the rights of third parties.

Property held by either of the constituent companies under lease or bailment, with express limitations or re-

strictions as to its use and enjoyment, can not be appropriated by the joint company, except subject to such limitations and restrictions; and a personal easement, such as a right in gross, which is not susceptible of assignment or transfer, can not, under the guise of articles of consolidation, be transferred or assigned either to a new company or to the constituent members of which such new company is formed.

That the case may be presented more intelligibly, a plat of the ground, showing the Rock Island bridge and the relation of the several railroads thereto, has been prepared under the direction of the Chief of Ordnance, and is annexed hereto, with the accompanying communication from the Chief of Ordnance.

HOLMES CONRAD,
Solicitor General.

OFFICE OF CHIEF OF ORDNANCE,
Washington, July 11, 1896.

Respectfully returned to the Hon. Holmes Conrad, Solicitor General, Department of Justice, Washington, D. C., with map and information requested enclosed.

The points where the R. I. & Peoria R. R. and the R. I. & Mercer Co. R. R's. connect with the C., R. I. & P. R. R. track is marked "A" on the map.

The point where the C., B. & Q. R. R. connects with the C. R. I. & P. R. R. is marked "B."

The point where the C., M. & St. P. R. R. connects with the tracks of the C., R. I. & P. R. R. is marked "C."

The scale of the map is about 700 feet per inch, which makes the distance on the C., R. I. & P. R. R. from the

points "A" and "B" to the nearest end of the bridge about ¾ of a mile, and from point "C" via C., R. I. & P. R. R. tracks to the nearest end of the bridge a little less than one mile.

D. W. FLAGLER,
Brig. Gen., Chief of Ordnance.

164-705

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164-705

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY. } No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR UNITED STATES IN REPLY.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, PLAINTIFF IN ERROR,
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CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY. } No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR UNITED STATES IN REPLY.

The "Additional brief for defendant in error" has just reached me.

Let it be borne in mind, what the learned author of that brief appears to have forgotten, that this case is not here on the evidence, or on findings of fact, but is here only on the demurrer to defendant's special plea. And the single question presented for consideration is, can the judgment of the lower court in overruling the demurrer to that special plea be sustained here? Does the

special plea set out an adequate reply to the demand made in plaintiff's declaration?

The special plea avers:

> Defendant is compelled to receive and *does receive at connecting points upon its line*, near the respective termini of said bridge, in the cities of Rock Island, State of Illinois, and Davenport, State of Iowa, *cars of other roads carrying freight and destined to points on said roads beyond said bridge*, or destined for delivery at the further terminus of said bridge, etc.

That is, that defendant company receives at points on its line of road near the termini of said bridge the cars of other railroads, which cars carry freight and are destined to points on the line of said other railroads beyond said bridge.

Necessarily, from this statement, such other railroads, from whom the cars are received, must extend from points on one side of the bridge to points on the other side, for the distinct averment of the plea is, that the defendant company receives at connecting points upon its line, near the respective termini of the bridge, "cars of other roads" "destined to points *on said roads* beyond said bridge."

So that the plain averment of this plea is, that the defendant company, under its "right of way" granted to it by the United States over the Rock Island Bridge, claims the right, under contracts with other railroad companies, to confer upon them the rights and privileges of passing their trains of cars over the bridge for a toll, to be enjoyed exclusively by the defendant company.

Do the acts of Congress *intend* any such result as this? If they do, why do they reserve to the United States the right to—

> Permit any other road or roads wishing to cross on said bridge to do so by paying to the parties then in interest the proportionate cost of said bridge, and securing to be paid its proportionate cost of keeping the same in repair?

Of what conceivable use could that proviso or reservation ever be to the United States if the defendant company had the right of extending to "any other road or roads wishing to cross on said bridge" the benefits of its own purchased right of way?

I have endeavored to show in my former brief that the use and enjoyment of a right of way in gross is confined exclusively to the person and for the specific objects specified in the grant. It can not be assigned or let or farmed out by the grantee to any other person. It can not be used or enjoyed by him for any other purposes than those specified.

And this particular grant by the United States must be construed in accordance with the rules clearly laid down and frequently enforced in this court, to wit, that a grant by the United States is always construed most favorably to the Government, and that grants under acts of Congress are construed in accordance with the *intent of Congress* as the same may be gathered from the act itself and from all other legislation *in pari materia*.

We submit in conclusion—

1. That the special plea should have been stricken out, because it set out no ground of defense which could not have been made under the general issue.

2. That the demurrer under the familiar practice of the courts should have been treated as an exception to the plea.

3. That the plea itself, for the reasons stated, does not disclose grounds which constitute a defense to the cause of action.

This case is not here on its merits. It is not here upon proofs on either side, and the additional brief of counsel for defendants in error appears to be directed only to a discussion of the supposed merits of the case.

HOLMES CONRAD,
Solicitor-General.

164-705

Supreme Court, U. S.
FILED
OCT 24 1896
JAMES H. McKENNEY,
CLERK.

64-705

(15507.)

IN THE

Supreme Court of the United States,

October Term, A. D. 1896.

No. 69.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ROBERT MATHER,
ATTORNEY FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

October Term, A. D. 1896.

No. 69.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

I.

STATEMENT.

This action grows out of the following facts:

Prior to 1868, the Chicago, Rock Island and Pacific Railroad Company, a corporation organized under the laws of the States of Illinois and Iowa, owned and operated a railroad extending from Chicago, in the State of Illinois, through Rock Island, on the Illinois side of the Mississippi river, and Davenport, on the Iowa side of that river, to a western terminus in the State of Iowa. It owned and maintained a bridge, on which its railroad was constructed across the river between the cities of Rock Island and Davenport. This bridge spanned the two channels

of the river on either side of the island known as Rock Island, and the line of railroad between the two spans of the bridge was laid across the island. This island, as is well known, had been, by a series of legislative acts not necessary to relate here, appropriated by the Federal government as a military station and the site of an arsenal and armory. For the convenient use of the island for this purpose, there was need of communication with the mainland; and the army appropriation act for the year 1868, approved March 2, 1867, made provision for the construction of a bridge across the river. The act appropriated: "For the erection of a bridge at Rock Island, Illi-" nois, as recommended by the chief of ordnance, two hundred " thousand dollars: *Provided*, that the ownership of said bridge " shall be and remain in the United States, and the Rock Island " and Pacific Railroad Company shall have the right of way " over said bridge for all purposes of transit across the island " and river, upon the condition that the said company shall, " before any money is expended by the government, agree to " pay and shall secure to the United States, first, half the cost " of said bridge; and, second, half the expenses of keeping " said bridge in repair, and upon guaranteeing said conditions " to the satisfaction of the Secretary of War, by contract or " otherwise, the said company shall have the free use of said " bridge for purposes of transit, but without any claim to " ownership thereof."

14 Stat. at Large, 485.

By joint resolution, approved July 20, 1868, this act was amended as follows: " *Be it resolved by the Senate and House* " *of Representatives of the United States of America in Con-* " *gress assembled*, That the act of Congress 'making appropria-" tions for the support of the army for the year ending June " thirty, eighteen hundred and sixty-eight, and for other pur-

"poses,' approved March two, eighteen hundred and sixty-
"seven, be, and the same is hereby, so amended as to au-
"thorize and direct the secretary of war to order the com-
"mencement of work on the bridge over the Mississippi River
"at Rock Island, to connect the said island with the cities of
"Davenport and Rock Island: *Provided*, That the owner-
"ship of said bridge shall be and remain in the United States,
"and the Rock Island and Pacific Railroad Company shall have
"the right of way over said bridge for all purposes of tran-
"sit across the island and river, upon condition that the said
"railroad company shall pay to the United States, first, half of
"the cost of the superstructure of the bridge over the main
"channel and half the cost of keeping the same in repair, and
"shall also build at its own cost the bridge over that part of
"the river which is on the east side of the island of Rock Is-
"land, and also the railroad on and across said island of Rock
"Island; and upon a full compliance with these conditions
"said railroad company shall have the use of said bridge for
"the purposes of free transit, but without any claim to the
"ownership thereof: and said railroad company shall, within
"six months after said new bridge is ready for use, remove
"their old bridge from the river and their railroad track
"from its present location on the island of Rock Island:
"*And provided further*, that the goverment may permit
"any other road or roads wishing to cross on said
"bridge to do so by paying to the parties then in in-
"terest the proportionate cost of said bridge, but no
"such permission to other roads shall impair the right
"hereby granted to the Chicago, Rock Island and Pacific Rail-
"road Company; and that the total cost of said bridge shall
"not exceed the estimates made by the commissioners ap-
"pointed under the act approved June twenty-seven, eighteen
"hundred and sixty-six: *And provided, also*, that in no case

"shall the expenditure on the part of the United States exceed "one million dollars.

"SEC. 2. *And be it further resolved*, That in case the Rock "Island and Pacific Railroad Company shall neglect or fail, "for sixty days after the passage of this resolution, to make "and guarantee the agreement specified in the act of appropri- "ation aforesaid, approved March second, eighteen hundred "and sixty-seven, then the Secretary of War shall be, and is "hereby, authorized and required to direct the removal of the "existing bridge and to direct the construction of the bridge "aforesaid, and expend the money appropriated for that pur- "pose in said act; and the said Rock Island and Pacific Rail- "road Company shall not have, acquire, or enjoy any right of "way, or privilege thereon, or the use of said bridge, until "the agreement aforesaid shall be made and guaranteed ac- "cording to the terms and conditions of said act of appropri- "ation. All acts or parts of acts inconsistent with these reso- "lutions, are hereby repealed.

"SEC. 3. *And be it further resolved*, That any bridge "built under the provisions of this resolution shall be con- "structed so as to conform to the requirements of section two "of an act entitled 'An Act to authorize the construction of "certain bridges, and to establish them as post roads,' ap- "proved July twenty-fifth, eighteen hundred and sixty-six."

15 Stat. at Large, 258.

In pursuance of the foregoing act and joint resolution, the Secretary of War caused to be built a bridge over the main channel of the Mississippi river between the island and the City of Davenport. The Chicago, Rock Island and Pacific Railroad Company, described in the act as "the Rock Island "and Pacific Railroad Company," built, at its own cost, the bridge over that part of the river which is on the east side of the island of Rock Island; also built, at its own expense, the

railroad on and across the island of Rock Island, paid to the United States one-half of the cost of the superstructure of the bridge over the main channel, and has ever since paid to the United States half the cost of keeping the same in repair. Said company also, within six months after the new bridge was ready for use, removed its old bridge from the river and its railroad track from its then location on the island, and constructed and thereafter maintained and operated its railroad upon and across the new bridge. It also, within the sixty days specified in section 2 of the joint resolution, made and guaranteed, in writing, the agreement specified in the act and resolution aforesaid, to the satisfaction of the Secretary of War. Its expenditures, made in reliance upon this legislation, aggregated about one million dollars.

In "An Act making appropriations for the construction, "completion, repair and preservation of certain works on riv- "ers and harbors, and for other purposes," approved March 3, 1881, Congress inserted the following section: SEC. 2. "That the joint resolution approved July twentieth, eighteen "hundred and sixty-eight, authorizing the construction of the "bridge over the Mississippi river, 'to connect the island of "Rock Island with the cities of Davenport and Rock "Island,' is hereby so amended as to require the "Chicago, Rock Island and Pacific Railroad Company to "charge for any cars carrying freight other than those passing "over its own road, and for its own cars when carrying freight "for other roads, which it may carry across said bridge, a sum "not exceeding three dollars for every loaded car, two-fifths of "which sums shall be paid by said railroad company into the "Treasury of the United States each month; and the monthly "returns thus made shall be in such form, and with such authen- "tication, as the Secretary of War shall direct."

21 Stat. at Large, 482.

The railroad company failing to make the payments contemplated by this act, the present suit was begun in the Circuit Court of the United States for the Northern District of Illinois, to recover the proportion of the tolls reserved by the act to the government, for the period between the date of the act and the commencement of the suit. To the plaintiff's declaration in *indebitatus assumpsit*, the defendant filed a special plea setting up the act of 1867, the joint resolution of 1868, the compliance by the Chicago, Rock Island and Pacific Railroad Company with the conditions prescribed in said act and resolution, and the subsequent construction of its railroad over, upon and across the bridge and island, and the operation of the same as a part of its continuous line of railroad from the City of Chicago, in the State of Illinois, to the City of Council Bluffs, in the State of Iowa, in the transaction of its business and the performance of its duties as a common carrier of goods and passengers. The plea further averred that the act of Congress, the joint resolution, the agreement of guaranty entered into and the acts done and expenditures made by the company in pursuance thereof, constituted a contract between the plaintiff and the railroad company, which it is not within the power of Congress to abrogate, modify or impair. The plea deduced the title of the present defendant, The Chicago, Rock Island and Pacific Railway Company, to the right thus granted to the Chicago, Rock Island and Pacific Railroad Company, through certain articles of consolidation to which said last named company and certain other railroad corporations were parties, entered into under and by virtue of the laws of the States of Illinois and Iowa, whereby the said constituent companies consolidated, united and merged their capital stocks, corporate and other franchises, rights, privileges and property of every nature and description and thereby created one consolidated corporation, to wit, the defendant. The plea continues:

"And defendant avers that by virtue of the said articles of "consolidation it did, on the said second day of June, A. D. "1880, take possession of the railroad of said Chicago, Rock "Island and Pacific Railroad Company, including that portion "of its said railroad so constructed over, upon and "across the bridge aforesaid, and has ever since continued "to operate the same in the transaction of its business "and the performance of its duties as a common carrier "of goods and passengers, and that said portion of its railroad "so constructed over, upon and across said bridge as afore- "said is a necessary part of its continuous system of railroad "extending from points in the State of Illinois to points in the "States of Iowa, Missouri, Nebraska, Kansas, Colorado and "Indian Territory. And in the performance of its duties as a "common carrier as aforesaid, defendant is compelled to receive "and does receive at connecting points upon its line near the "respective termini of said bridge in the cities of Rock Island, "State of Illinois, and Davenport, State of Iowa, cars of other "roads carrying freight and destined to points on said other "roads beyond said bridge or destined for delivery at the fur- "ther terminus of said bridge, and is likewise compelled to re- "ceive and does receive in its own cars at said connecting "points freight to be carried across said bridge for other roads, "and defendant avers that in the course of its business and in "the performance of its duties as a common carrier as afore- "said it has received from time to time from the said railroad "companies in said declaration mentioned, at said connecting "points near the respective termini of said bridge, cars of said "other railroads carrying freight, and has carried the same "across said bridge, and has in like manner transported its own "cars carrying freight for said other roads across said bridge, "and that the said several supposed cars in the said declaration "mentioned, if any of the same were carried by the defendant

"over the bridge of the plaintiff aforesaid, were so carried by "defendant in the regular course of its business and in the "performance of its duties as a common carrier as aforesaid, "and this the defendant is ready to verify."

To this plea the plaintiff filed a general demurrer which was overruled by the Circuit Court, and, the plaintiff electing to stand by its demurrer, judgment was rendered in favor of defendant for costs. From this judgment, plaintiff prosecutes the present writ of error.

II.

ARGUMENT.

1. THE GOVERNMENT HAS NO POWER TO ALTER THE TERMS OF ITS CONTRACT WITH THE DEFENDANT.

This record presents the question: Can the Federal government, being the owner of property, grant to a railway company, for a valuable consideration, a right of way over such property, and subsequently, without the consent of the company, impose upon the further enjoyment of the easement conditions not contained in the original grant?

To ask this question is to answer it. The government acted, in the legislation relating to the use of the bridge by the railroad company, in the private capacity of a contractor. Throughout the transaction, it exercised none of its functions of sovereignty. The corporation with which it dealt was the creature of the laws of the States of Illinois and Iowa. It derived its right to be, to hold property and to make contracts, from the laws of those states. It owed none of its powers of existence

or of action to the Federal government, and was subject to no control or regulation by that government except such as might be exercised under the commercial power conferred on Congress by the constitution. That power might be invoked to compel the removal of the railroad company's old bridge, provided it were an obstruction to navigation, but it could not compel the railroad company to use the new bridge to be built by the government. That was a matter concerning which each party was competent to deal with the other on equal ground and at arm's length. The government was at perfect liberty to sell or refuse to sell to the railroad company the right of way over its projected bridge; the railroad company was at perfect liberty to buy or to decline to buy such right of way. Under such circumstances, the acceptance by the railroad company of the Federal legislation, and its compliance with the terms imposed thereby, constituted a contract between the United States and the company, which was as binding upon both of the parties as any valid contract between natural persons. As was said by this court with reference to certain sections of the Pacific Railway acts: "These sections, taken together, constitute the "contract between the United States and the appellee. (Citing "*U. S.* v. *R. R. Co.*, 91 U. S., 72; *Sinking Fund Cases*, "99 U. S., 700, 718; *R. R. Co.* v. *U. S.*, 104 U. S., 662.) "This contract is binding on the United States, and they can- "not, without the consent of the company, change its terms by "any subsequent legislation."

U. S. v. *R. R. Co.*, 118 U. S., 235, 238.

In the *Sinking Fund Cases* (99 U. S., 700), even the majority opinion was prefaced by a statement of the inflexible rule that the government has no more power than an individual to vary the terms of a contract to which it is a party.

Said Chief Justice WAITE (p. 719): "The United States

"are as much bound by their contracts as are individuals. If "they repudiate their obligations, it is as much repudiation, "with all the wrong and reproach that term implies, as it "would be if the repudiator had been a state or municipality "or a citizen. No change can be made in the title created by "the grant of the lands, or in the contract for the subsidy "bonds, without the consent of the corporation. All this is "indisputable."

The vigorous dissenting opinions in those cases were grounded upon this proposition. Mr. Justice STRONG and Mr. Justice FIELD quoted from Alexander Hamilton's communication to the senate of January 20, 1795, the following: "When a government enters into a contract with an individ- "ual, it deposes, as to the matter of the contract, its constitu- "tional authority, and exchanges the character of legislator "for that of a moral agent, with the same rights and obliga- "tions as an individual. Its promises may justly be consid- "ered as excepted out of its power to legislate, unless in aid "of them. It is in theory impossible to reconcile the idea of "a promise which obliges, with a power to make a law which "can vary the effect of it." Of this proposition Mr. Justice STRONG said (p. 731): "If this be sound doctrine, it is as "much beyond the power of a legislature, under any pretence, "to alter a contract into which the government has entered "with a private individual, as it is for any other party to "change its terms without the consent of the person contract- "ing with him. As to its contract, the government in all its "departments has laid aside its sovereignty, and it stands on "the same footing with private contractors."

The dissenting opinion of Mr. Justice FIELD contained the following: (p. 759) "Now, there was no grant by the United "States to the Central Pacific Company of corporate rights, "privileges and immunities. No attribute of sovereignty was

"exercised by them in its creation. It took its life and all its "attributes and capacities from the State. Whatever powers, "rights and privileges it acquired from the United States it "took under its contract with them, and not otherwise. The "relation between the parties being that of contractors, the "rights and obligations of both, as already stated, are to "be measured by the terms and conditions of the contract. "And when the government of the United States entered into "that contract, it laid aside its sovereignty and put itself on "terms of equality with its contractor. It was then but a "civil corporation, as incapable as the Central Pacific of "releasing itself from its obligations, or of finally determin-"ing their extent and character. It could not, as justly "observed by one of the counsel who argued this case, '*re-*" "'*lease itself and hold the other party* to the contract. It "'could not change its *obligations* and hold its *rights* un-"'changed. It cannot bind itself as a *civil corporation* and "'loose itself by its sovereign legislative power.'"

Mr. Justice HARLAN relied upon the proposition thus asserted in the *Sinking Fund Cases*, in his dissenting opinion in the case of *Canada Southern Railway Co.* v. *Gebhard*, 109 U. S., 527.

The foregoing citations, though apt, are surely superfluous. To support either by argument or by authority, the proposition that the Federal government has no power to abrogate or alter its contracts, lawfully made, is to attempt to demonstrate an axiom. The proposition will find neither doubters on this bench, nor assailants among the learned counsel for the government.

2. THE ORIGINAL GRANT FROM THE GOVERNMENT TO THE RAILROAD COMPANY INCLUDED THE RIGHT ON THE PART OF THE LATTER TO CARRY OVER THE BRIDGE THE CARS AND FREIGHT OF OTHER ROADS.

This clearly appears from the most casual consideration of the legislation of 1867 and 1868. What was granted was the "right of way over said bridge for all purposes of transit "across the island and river," or, as expressed in another place in the act, "the use of said bridge for the purposes "of free transit." This grant was made to a railroad corporation and was made, of course, in contemplation of the powers and duties of such a corporation. The "purposes of "transit" for which the grant was made, were, by necessary implication, such purposes as were requisite for the exercise of the powers and the performance of the duties belonging to the corporation. The corporation could not *itself* go across the bridge; it could only use the right of way across the bridge in the manner and for the purposes for which it was authorized by law to have a right of way. The primary and essential, if not the only use which a railroad company has for a "right of way" is to supply the physical facilities for operating its trains. This was the use that it had for the right of way across the government bridge. That use was granted by the government in express terms "for all purposes of "transit." No limitation of the right of way to any specific use, to any particular kind of trains, or cars, or traffic, was expressed in or contemplated by the act. The words, "all "purposes of transit," included all the uses of the right of way which the railroad company might lawfully make under its corporate powers. One of the uses which the railroad company might lawfully make of the right of way granted to it by the government was the very use for which the act of

1881 seeks to compel the company to make additional compensation to the government. By this I mean to say that, under the laws of its organization and existence, the railroad company was both authorized and compelled to carry over its railroad, of which that portion laid upon the bridge and island was an essential and integral part, "any cars" of other persons or corporations "carrying freight," as well as "its own "cars, when carrying freight for other roads." Having such power, or owing such duty, the transportation of the cars of other roads or of freight for other cars, was one of the "purposes of transit" included within the express language of the grant of 1867 and 1868.

It is assumed that the expression in the act of 1881, "cars "carrying freight other than those passing over its own road," means the cars of other roads; that is, cars coming from or belonging to other lines of road than that of the defendant. Such was the construction contended for by the learned District Attorney in the court below, and such, indeed, is the only construction which gives coherence to the act. My contention is that the railroad company, both as the proprietor of a public highway and as a common carrier, was not only authorized but compelled, at the time the contract for the use of the bridge was entered into, to carry both the cars of other roads and freight for other roads, whenever tendered.

This court has drawn with clearness and accuracy the distinction between the character of a railroad corporation as the proprietor of a public highway and its character as a common carrier.

Lake Superior & Mississippi R. Co. v. *U. S.*, 93 U. S., 442.

In the former capacity a railroad company maintains its physical structure as a public highway open for use by the car-

riages or cars of any person or corporation who may require the transportation of such vehicles over the road. In the latter capacity the railroad company is clothed with the powers and charged with the responsibilities of a common carrier, as those responsibilities and powers are defined at the common law or prescribed by statute. The doctrine of this case has but recently been reaffirmed by your Honors. Said the Chief Justice at the last term: "In *Lake Superior & Mississippi* "*Ry. Co.* v. *U. S.*, 93 U. S., 492, Mr. Justice Bradley ad- "verts to and comments on the fact that in England and in "this country, railroads, when first constructed, were by the "legislatures and the people regarded and treated as public "highways for the use of all who had occasion to run their ve- "hicles thereon; and this is certainly so far true in the modern "acceptation that being for the common use of the public, "their owners are ordinarily competent to make contracts "which would subserve such use."

Union Pacific Ry. Co. v. *Chicago, etc., Ry Co.*, 163 U. S., 564, 585.

In its capacity as the owner of a public highway, then, the railroad company was authorized, even if it could not be compelled, to accept for transportation over its rails the cars of any person or other railroad company. Aside from the considerations advanced in the Lake Superior case, this obligation was specifically enforced upon the railroad company by the laws of the states of its organization. The legislature of Iowa, in 1862, passed an act, which was in force at the time of the enactment of the Federal legislation with reference to the bridge and which reads as follows: "That any railroad company in "this state, owning a railroad, shall, on request, permit any "other railroad to connect with and shall draw over its road

"the cars of any other railroad connecting with it at reasonable "times and for a toll not exceeding its ordinary rate."

Laws of Iowa, IX G. A., Ch. 158, Sec. 1, p. 183.

In 1874, this section was amended to read as follows:

"SEC. 11. Any railway corporation operating a railway in "this state intersecting or crossing any other line of railway "of the same guage operated by another company, shall, by "means of a 'Y' or other suitable and proper means, be made "to connect with such other railway so intersected or crossed; "and railway companies, where railroads shall be so connected "shall draw over their respective roads the cars of such con- "necting railway and also those of any other railway or rail- "ways connecting with said roads made to connect as aforesaid "and also the cars of all transportation companies or persons "at reasonable terms and for a compensation not exceeding "their ordinary rate."

McClain's Annotated Code of Iowa, Section 1987.

In 1867, the legislature of Illinois passed an act of which the following is a part:

"SEC. 11. Railroads terminating, or to terminate at any "point on any line of continuous railroad thoroughfare where "there now is or shall be a railroad bridge for crossing of "passengers and freight in cars over the same as part of such "thoroughfare, shall make convenient connections of such "railroads, by rail, with the rail of such bridge; and such "bridge shall permit and cause such connections of the rail of "the same with the rail of such railroads, so that by reason of "such railroads and bridge, there shall be uninterrupted com- "munication over such railroads and bridge as public thorough- "fares. * * *

"SEC. 12. Whenever the lines of any railroads in this "state shall cross or intersect, it shall be the duty of the com- "panies or persons controlling or managing such railroads, to "make just and equitable contracts for the interchange of "business and for the accommodation of such business as it may "be desirable to transact over all or a portion of each of said "intersecting lines, to both lines; and in case the officers of "said companies cannot agree as to the manner and terms "upon which such joint business shall be interchanged, the "said companies shall each choose an impartial person, familiar "with the management of railroads and the two thus chosen "shall select a third person to act with them; and the award "of the persons thus selected or a majority of them, as to the "terms and manner for transacting said joint business, shall "be conclusive and binding upon both parties. In case either "of said roads shall refuse to select such referee, then the "county court may select such referee upon application of "either party.

"SEC. 13. At the point where two or more railroads meet "or cross, it shall be the duty of any such railroad companies, "or either of them, to render all the facilities necesssary for "the speedy transfer of grain, produce or merchandise, to its "destination, and it shall be the duty of all such railroad com- "panies to deliver to any warehouse as directed, any and all "cars which may be consigned thereto, and to remove from "such warehouse such cars as may be laden thereat for trans- "portation from such warehouse on the request of the owner "or warehouseman, to be shipped within a reasonable time "thereafter, and any railroad company shall run the cars of "connecting roads over their track, but may charge therefor "a reasonable track service, not exceeding the price per mile "of the transportation of like articles from local points on the "line of such road."

1 Gross' Statutes, Ch. 86 *a*.

At the time, then, that the United States granted to the railroad company "the right of way over the bridge for all "purposes of transit," the company was compelled to carry over its railroad, including that part laid upon the bridge, not only its own cars, but the cars of any other company tendered to it for transportation. If it be said that these acts of the States of Illinois and Iowa were inefficient, because of the Federal power over interstate commerce, to require the railroad company to receive and transport cars of other roads for the necessarily interstate passage across the bridge, it may be replied that the Federal government itself had, previous to the legislation of 1867 and 1868, granted to the railroad company the right to carry the cars and freight of other roads in the transaction of interstate business. The act passed June 15, 1866, and preserved in the Revised Statutes as section 5258, provides: "Every railroad company in the United States, whose road is "operated by steam, its successors and assigns, is hereby au- "thorized to carry upon and over its road, boats, bridges and "ferries, all passengers, troops, government supplies, mails, "freight and property on their way from any state to another "state, and to receive compensation therefor, and to connect "with roads of other states so as to form continuous lines for "the transportation of the same to place of destination."

The laws existing at the time the contract between the railroad company and the government was made, so far as they lawfully might, entered into that contract and constitute its binding force. Even if the laws of the states which have been quoted may be said to have no effect upon the contract, certainly this provision of the general statutes, expressing the Federal policy with reference to the powers of corporations engaged in interstate transportation, must be read into the contract evidenced by the bridge legislation. So read, the legis-

lation of 1867 and 1868 granted a "right of way over the "bridge for all purposes of transit across the island and river" to a railroad company then authorized and encouraged by Federal law, to "carry upon and over its road * * * freight and "property on their way from any state to another state and to re "ceive compensation therefor." The grant of a right of way "fo "all purposes of transit," to a corporation having such duties and powers necessarily included the right to carry cars and freight for other roads, "and to receive compensation there- "for."

A consideration of the railroad company's duties as a common carrier forces the conclusion that it was not only authorized but required, at, before and since the bridge contract was made, to transport upon all portions of its road, if not the cars, at least the freight of other roads. It is to be observed that the act of 1881, on which this action is based, is designed to impose a toll, not upon the cars of other railroads crossing the bridge, but upon *the freight* transported in the cars. The act requires the payment of such tolls not on all "cars of other roads," but only on cars of other roads "*car-* "*rying freight*" over the bridge. It also requires the payment of such toll upon defendant's "own cars *when carrying* "*freight* for other roads." The toll sought to be imposed, therefore, is upon the freight and not upon the cars; the defendant is required to pay tribute to the government not on the *cars* of other roads, but upon the *freight* of other roads carried across the bridge, whether in the cars of the other roads or in the defendant's own cars. Now, as a common carrier, the railroad company was and is compelled to carry freight for other roads. This duty is inherent in the occupation of a common carrier and is included in every approved definition of the term: "A common or public carrier is one "who undertakes as a business, for hire or reward, to carry

"from one place to another the goods of all persons who may "apply for such carriage, provided the goods be of the kind "he professes to carry and the persons so applying will agree "to have them carried upon the lawful terms prescribed by the "carrier; and if he refuse to carry such goods for those who "are willing to comply with his terms, becomes liable to an ac- "tion by the aggrieved party for such refusal."

Hutchinson on Carriers, Sec. 47.

Atchison, etc., R. Co. v. *D. & N. O. R. Co.*, 110 U. S., 667, 674.

The defendant may no more refuse to carry freight tendered to it by "other roads" than it may refuse so to carry for any other person or corporation. It may, perhaps, refuse to receive the cars of another railway company containing freight for carriage, at least in the absence of statutes such as those of Illinois and Iowa quoted *supra*, and may require that the freight tendered to it in cars of other roads should be transferred to its own cars.

Oregon Short Line & U. N. R. Co. v. *Northern Pacific R. Co.*, 51 Fed., 465; S. C. (U. S. Circuit Court of Appeals) 61 Fed., 158.

But there can be no question that a railway company has not the right to refuse to carry freight tendered to it by another railway company, whether that freight belongs to the tendering company or to others.

When, therefore, the Federal government granted to the common carrier corporation with which it dealt in 1867 and 1868, a "right of way over said bridge for all purposes of "transit across the island and river," it granted a right of way for the purpose of carrying freight of other roads across the bridge.

3. THERE WAS NO RESERVATION IN THE LEGISLATION OF 1867 AND 1868 OF ANY RIGHT ON THE PART OF THE GOVERNMENT TO ALTER THE TERMS OF THE CONTRACT THERE MADE.

In the court below the learned District Attorney sought to support an argument in favor of the maintenance of the present action upon these words of the resolution of July 20, 1868: "*And provided further*, that the government may permit any "other road or roads wishing to cross on said bridge, to do so "by paying to the parties then in interest, the proportionate "cost of said bridge, but no such permission to other roads shall "impair the right hereby granted to the Chicago, Rock Island "and Pacific Railroad Company." It was urged that this language contemplated the possibility of a future grant of right of way across the bridge to other railroad companies. It was vaguely suggested that the action of the Rock Island Company in carrying over the bridge freight for other roads, rendered it unnecessary for such other roads to acquire from the government the right "to cross on said bridge"; that in consequence, the government had been disappointed of the revenue that it might have derived from such contracts, had it been able to make them, and that the Rock Island Company should make good the loss. It is only necessary to say that, if the railroad company acquired the right, under the grant of the right of way over the bridge, to carry freight for other roads, that right would not be vitiated by the circumstance that the exercise of it diminished the chances of the government to make a profitable arrangement with other roads for the use of the bridge. The rights of the parties are measured by the terms of the grant. The railroad company had the right to conduct its business as the owner of a public highway, and as a common carrier, and to use the bridge for all purposes required in

the transaction of such business; among those purposes was the transportation of cars and freight for other roads. The government had the right to grant to other railroad companies a right of way across the bridge, subject always, however, to the condition that "no such permission to other roads shall "impair the right hereby granted to the Chicago, Rock Island "and Pacific Railroad Company." The fact that the exercise by the Rock Island Company of its rights under the grant made it impossible for the government to induce other companies to contract for a right of way across the bridge, could not give to the government the power to alter the terms or add to the conditions of the grant. As was said in a case already quoted, "It might be very convenient for the government to "have more rights than it has stipulated for; but we are on a "question of construction, and on this question the *usus* "*loquendi* is a far more valuable aid than the inquiry what "might be desirable." *Lake Superior & Mississippi R. Co.* v. *U. S.*, *supra*. The *usus loquendi* in this case admits of but one construction. The acts of 1867 and 1868 express the contract between the government and the railroad company. The latter is entitled to exercise the rights there conferred and upon the conditions there prescribed. Nothing in the acts reserved to the government the power to impose further conditions upon the exercise of the company's rights.

4. THE ACT OF 1881 IMPOSES CONDITIONS UPON THE ENJOYMENT OF THE RIGHT OF WAY ACROSS THE BRIDGE THAT WERE NOT CONTAINED IN THE ORIGINAL GRANT.

This, indeed, was the expressed object of the act of 1881. It was avowedly an "amendment" of the joint resolution of 1868. It attempts, in the first place, to fix a minimum toll which the company is "required" to charge for every car

of freight "which it may carry across said bridge" for other roads. It asserts, in the second place, a right to a share of such tolls, and demands an accounting and division. No right to do either of these things was secured to the government in the contract under which it sold to the company the right of way across the bridge. It is conceivable that a less toll than the minimum prescribed by the act of 1881 might be a reasonable charge for carrying a car of freight across the bridge, and the company might lawfully carry at such lesser charge. And whatever charge it might lawfully make it was entitled to retain. The act of 1881 sought to inject into the contract between the government and the defendant, then, two conditions that were not only foreign but antagonistic to the original agreement. It sought to require additional compensation for the exercise of a right already compensated for. It attempted to vary in a material point the terms of its contract with defendant. This it was beyond the power of the government to do.

I submit, in conclusion, that the following propositions are demonstrated, or rather, are self-evident:

1. There was a lawful contract in 1868 between the government and the railroad company for a right of way across the bridge on certain conditions, that have been complied with.

2. That contract secured to the railroad company the right to transport across the bridge both cars and freight for other roads, without making compensation to the government except as provided in the acts of 1867 and 1868.

3. The original contract reserved no right on the part of the government to alter its terms.

4. The act of 1881 imposes additional and burdensome conditions upon the exercise by the defendant of the rights secured to it under its contract.

5. The act of 1881, therefore, is void.

III.

REPLY TO BRIEF FOR THE UNITED STATES.

1. IT IS TOO LATE TO RAISE TECHNICAL OBJECTIONS TO THE PLEADINGS.

If the government had wished to take advantage of the objection that the matters relied upon in the special plea could be offered in evidence under the general issue, such objection should have been taken by motion to strike the special plea from the files or by special demurrer to the plea. Such is the Illinois practice.

Warner v. *Crane*, 20 Ill., 148.

Mann v. *Oberne*, 15 Ill. App., 35.

The filing of a general demurrer to the special plea waived any objection on this ground that might have been taken by motion to strike or by special demurrer. The general demurrer raised only the question of the sufficiency of the special plea as a defense on the merits to the cause of action set forth in the declaration, without reference to the fact that the plea of the general issue also raised that question. If the demurrer to the special plea were properly overruled, there was no error in rendering judgment for the defendant, upon the plaintiff's election to abide by its demurrer, especially as the plaintiff then made no objection that the plea of general issue was also on file and undisposed of. Such an objection at that time could easily have been obviated by the withdrawal of the plea of general issue. The objection that the case was disposed of with that plea still on file, comes too late in this court.

2. THE PLEA PRESENTS A GOOD DEFENSE TO THE CAUSE OF ACTION ALLEGED IN THE DECLARATION.

The learned Solicitor General ignores in his brief the act of 1881. Yet there is no authority for the prosecution of this suit except in that act, and the declaration proceeds expressly upon the act and in its very language. The action is brought, in the words of the declaration, for money "received by the "defendant for the use of the plaintiff as tolls upon one hun- "dred thousand cars carrying freight other than those passing "over the road of the defendant, and for the cars of the de- "fendant when carrying freight for other roads." This is the language of the act of 1881. Subsequent allegations of the declaration show that the action is brought to recover "money "before that time received by the defendant from (certain "railroad companies) for the use of the plaintiffs, as two-fifths "of the tolls upon (stated numbers of) cars at the rate of three "dollars per car." This, again, is the language of the act of 1881. It is clear that the suit was brought to recover the tolls sought to be reserved to the government by that act, and that the declaration was intended to follow the language of the act.

This statement is necessary for the reason that the learned Solicitor General seems to have been misled by the punctuation of the declaration as it appears in the record, into a misconception of the scope of the suit. He says (p. 5): "The "declaration expressly excepts from its demand, any tolls col- "lected by defendant from cars 'passing over the road of the "defendant and for the cars of the defendant when carrying "freights for other roads.'" It is clear that the declaration does not expressly except from its demand any tolls collected by defendant "for the cars of the defendant "when carrying freight for other roads." Defendant is expressly required by the act of 1881 "to charge for

"any cars carrying freight other than those passing over its "own road, and for its own cars when carrying freight for "other roads, which it may carry across said bridge, a sum not "exceeding three dollars for every loaded car, two-fifths of "which sum shall be paid by said railroad company into "the Treasury of the United States." The only cars that are excepted from this obligation to charge and account for these tolls, are "cars carrying freight * * * passing over its "own road." The declaration, following as it does, the exact words of the statute, has the same meaning and "excepts "from its demand" only "cars carrying freight * * * "passing over its own road." What is sought to be recovered in the suit is the government's proportion of the charge, *first*, "for any cars carrying freight other than those passing "over its own road;" *second*, "and for its own cars when "carrying freight for other roads, which it may carry across "said bridge."

This being understood, the objection of the learned Solicitor General that the plea "does not confess the charge in the plaintiff's declaration," is readily seen to be unfounded. His argument on this point overlooks the significance of the averment in the plea that "said portion of its (defendant's) railroad "so constructed over, upon and across said bridge as aforesaid, is a necessary part of its continuous system of railroad "extending from points in the State of Illinois, to points in "the States of Iowa, Missouri, Kansas, Colorado, Nebraska "and the Indian Territory." Both the Congress which passed the act of 1881 and the Solicitor General in this case have assumed that the structure across the island, being the property of the government, was *not* part of the defendant's railway. The plea avers, in this quotation, the physical fact that it *was* such part of defendant's railway. It then proceeds to aver, as a fact, what would probably

be inferred as a matter of law, that "in the per- "formance of its duties as a common carrier as aforesaid, de- "fendant is compelled to receive and does receive at connect- "ing points upon its line near the respective termini of said "bridge in the cities of Rock Island, State of Illinois, and "Davenport, State of Iowa, cars of other roads carrying "freight and destined to points on said other roads beyond "said bridge or destined for delivery at the further terminus "of said bridge, and is likewise compelled to receive and does "receive in its own cars at said connecting points freight to be "carried across said bridge for other roads." This is an averment that it was the legal duty of the defendant to carry across that portion of its railroad laid on the government bridge cars and freight for other roads in the same manner as it is compelled by law to receive and carry over other portions of its road cars and freight for other roads. Then follows the averment of fact "that in the course of its business and in "the performance of its duties as a common carrier as afore- "said it has received from time to time from the *said railroad "companies in said declaration mentioned* at said connecting "points near the respective termini of said bridge, cars of said "other railroads carrying freight, and has carried the same "across said bridge, and has in like manner transported its "own cars carrying freight for said other roads across said "bridge, and that the said several supposed cars in the said "declaration mentioned * * * were so carried by de- "fendant in the regular course of its business and in the per- "formance of its duties as a common carrier as aforesaid."

These averments taken together amount to allegations: (1) that the cars mentioned in the declaration for which a toll is sought to be recovered in this suit, were carried by the defendant over that portion of its railroad laid upon the government bridge; (2) that they were so carried by the defendant

in its capacity and because of its duties and powers as a common carrier of commerce among the states. The fact of the carriage of the cars across the bridge is admitted. The defendant would be liable under the act of 1881 to pay its proportion of the tolls thereby sought to be imposed, whether it actually collected those tolls or not; so that an admission of the collection of the tolls was not necessary. The averments of the plea are, and were intended to be, a full confession of the facts necessary to a recovery under the act of 1881, provided that act is efficacious to impose such an obligation upon the defendant. The facts set forth in the plea relating to the contract between the railroad company and the government are relied upon as a sufficient avoidance of this confession.

If the Solicitor General's reading of the declaration be correct; if it be true that "the declaration expressly excepts "from its demand any tolls collected by defendant from cars "'passing over the road of the defendant' and for the cars of "the defendant when carrying freights for other roads," then this suit is brought *only* for tolls collected by defendant for cars carried across the bridge, but *not* "passing "over the road of defendant." To this claim the plea is a perfect answer; for it avers that, under its contract defendant's predecessor constructed its railroad upon and across the bridge, and the defendant still maintains that portion of its railroad upon and across the bridge as an essential part of its line of interstate railway. The tracks across the bridge are a part of "the road of defendant"; cars carried over the bridge on those tracks are cars "passing over the road of de-"fendant." If the declaration counts only upon cars *not* "passing over the road of defendant," then it clearly appears by the plea that there are no such cars.

If, on the other hand, as was claimed at the circuit, and as the act of 1881 plainly intends, this suit is brought as well for

cars of other roads carried across the bridge, as for defendant's "own cars when carrying freight for other roads," then the plea plainly confesses that such cars and freight were carried, but avoids the force of the confession by averring defendant's right so to carry as a common carrier, under its contract with the government for a right of way across the bridge "for "all purposes of transit."

The Solicitor General's captious criticisms of the language of the plea are heard for the first time in this court. In the court below the plea was treated, both by the District Attorney and by the learned judge, as a full confession of the allegations of the declaration. I submit that it is now too late for the government to treat it otherwise. Some of the criticisms, however, are not entirely frank, and time will be taken to answer them.

The assertion (p. 6) that the plea "does not aver, and "could not truthfully aver, that the railroad companies in said "declaration mentioned did connect at any point with defend-"ant's line of railroad," is refuted by the language of the plea that, "defendant avers that * * * it has received "from time to time *from the said railroad companies in said "declaration mentioned, at said connecting points* near the re-"spective termini of said bridge, cars of said other railroads "carrying freight," etc. The "said connecting points" are described in preceding language of the plea, which is quoted by the Solicitor General on pages 6 and 7 of his brief. That such connections do exist between defendant's road and the roads of the railroad companies mentioned in the declaration is shown by the communication and map from the Chief of Ordnance, attached to the government's brief.

The complaint (p. 7) that: "It is for tolls received from "railroads mentioned in the declaration and not for 'cars of

"said *other* railroads,' that the demand is here made," is perfectly pointless in view of the palpable reference of the words "said *other* railroads" to the "railroads mentioned in the "declaration." The only use of the word "other" in this connection, was to differentiate the companies mentioned in the declaration from the defendant.

We leave these criticism of the plea with this summary of its scope. It admits that defendants carried across the bridge the cars for which the government seeks, by the act of 1881 and by this suit to collect tolls. It avers that, while it carried the cars across the bridge, it also carried them upon its own railroad, and it asserts its right so to carry them without paying a bridge toll to the government. If its conclusions of law are sound, the plea is an answer to the plaintiff's claim.

3. THE DEFENDANT HAS NOT FARMED OUT TO OTHERS ANY RIGHTS IN THE PLAINTIFF'S BRIDGE. IT HAS ONLY EXERCISED THE RIGHTS SECURED TO IT BY ITS CONTRACT.

The Solicitor General has been guided by a false light in his examination into the questions presented by this record. He says: "This is a grant by the United States of a valuable "privilege to the defendant company. * * * And in "seeking for the true construction of the whole it should be "borne in mind that every grant from the sovereign authority "is to be construed strictly against the grantee and in favor "of the government." No such rule of construction is applicable to the contract between the plaintiff and the defendant in this case. This was not, in the sense in which the Solicitor General uses the words: "a grant by the United States of a "valuable privilege to the defendant." It was a sale, for a valuable consideration, by the government in its private capacity as the owner of a bridge, of an easement in and over that property. The grant was not "from the sovereign authority"

but from a private owner of property to a civil corporation standing *pro hac vice* on equal ground with the grantor. The same rule of construction is to be applied to this grant that would be applied to a grant by a private property owner to the railway company of the right of way over the lands on either side of the river. The rule of strict construction announced in *Hannibal & St. Joe R. R. Co.* v. *M. R. Packet Company*, 125 U. S., 260, cited by the Solicitor General, was applied to the case of a grant of a privilege to erect and maintain a bridge with piers in a navigable stream. The grant there was "of a valuable privilege." The rule of construction applicable to such a grant is not appropriate in the case of a bargain and sale by the government.

Bearing this distinction in mind, the conclusions which the Solicitor General reaches as to the scope and effect of the legislation and contract relating to the bridge, invite the following suggestions:

He says (p. 10): "From all which it is manifest (1) that "the United States retained to themselves the absolute and exclusive ownership of said bridge."

While it is true that the act and joint resolution provided that the railroad company should be "without any claim to ownership" of the bridge, and "that the ownership of said bridge "shall be and remain in the United States," still it is hardly accurate to say that the government's ownership is "absolute "and exclusive." Its title to the bridge, while paramount, is subject to the easement imposed upon it and carved out of it for the benefit of the railroad company. Its title is precisely the same as that of the owner of land who grants a right of way for railroad purposes across his land. The paramount title remains in the grantor, but subject always to the easement imposed upon the land.

The Solicitor General's second conclusion is: "That they

"(United States) granted to the defendant company the right "to use said bridge for the purposes of its railway." This is a clear and full concession of the defendant's position. One of the "purposes of its railway" is to carry cars and freight, not for all persons *except* the corporations named in the declaration, but for all persons who may offer such property for carriage, *including* the corporations there named.

The third conclusion of the government is: "That they "(United States) reserved to themselves the right to grant sim- "ilar rights and privileges to other railroad companies who "might desire the use of said bridge for conveyance of their "cars and freight." The right actually reserved was the right to "permit any other road or roads wishing to cross on said "bridge to do so by paying to the parties then in interest "the proportionate cost of said bridge, and securing to be paid "its proportionate cost of keeping the same in re- "pair." There is no ambiguity about this language and no occasion for doubt as to its meaning. It clearly reserves to the government, under certain conditions, the power to grant to any other railroad company than the defendant, the right to use the bridge in the same manner that the defendant is authorized to use it, viz: to operate its trains across it. That power still remains in the government, and has not been impaired or usurped by the defendant. No other railroad companies have been permitted "to cross on said "bridge," either by the government or by the railroad company. All that has been done by the latter has been to carry upon its railroad laid upon and across the bridge, as by law it is permitted and compelled to do, cars and freight for other roads. If it had been the intention of the contracting parties, in the legislation of 1867 and 1868, to prohibit to the railroad company the right to carry cars and freight for other roads across the bridge, in order that thereby other roads having

freight or cars which they wished to have transported across the river at that point might be forced to purchase from the government the right to "cross on said bridge," this intention would have been clearly expressed. No such intention to deprive other railroad companies of the right, which all persons enjoy, to require the defendant to transport their property, whenever tendered, over any portion of its road, appears either expressly or by implication in the act of 1867 or the joint resolution of 1868. The fact that by the exercise of this right other roads might secure transportation for their cars and property across the river on more advantageous terms than would be possible under an arrangement with the government for the right "to cross on said bridge," cannot possibly extend the rights of the government as against the defendant company. Those rights are measured by the terms of the grant. They are confined in this respect to the privilege of permitting "any other road or roads wishing to cross on said "bridge to do so," under certain terms. This power cannot, by any rule of construction known to the law, be expanded into a right to prohibit the defendant from carrying over that portion of its railroad laid upon the bridge, the cars and freight of other roads. The general principles cited by the government's brief from other cases (pp. 11 and 12), may be perfectly sound and entirely apt as applied to the cases in which they are announced, but they have no bearing on this case.

If, however, the plaintiff's bridge is to be considered real estate, and if the refinements of the law of easements are to be applied to a right of way such as the one granted here, it may reasonably be claimed that the right of way over the bridge is appurtenant to defendant's railroad on either side of the river. That railroad is certainly real estate, and the way granted by the government comes clearly within the definition of a way appurtenant to that estate.

"Ways," says Mr. Washburn, "are said to be appendant "or appurtenant when they are incident to an estate, one "terminus being on the land of the party claiming. They "must inhere in the land, concern the premises, and be essen- "tially necessary to their enjoyment. * * * A way ap- "pendant cannot be turned into one in gross, because it is in- "separably united to the land to which it is incident."

Washburn's Easements and Servitudes, 3d Edition, 232.

In the same connection, the author says: "A way is never "presumed to be in gross when it can fairly be construed to "be appurtenent to land."

Now, both the termini of the way across the bridge in this case are "on the land of the party claiming." It is incident to the estate of the railroad company in its railroad on either side of the river. It concerns the premises, *i. e.*, the railroad, and is essentially necessary to its enjoyment. It is not only so in fact, but it must have been so in the contemplation of both the government and the railroad company when the grant of the right of way was made; for the right of way then granted was intended to take the place of and to be a complete substitute for the railroad company's own bridge across the river, which, under the terms of the contract, was subsequently removed. The way granted by the government across the bridge is clearly incident and appurtenant to the defendant's railroad, and, of course, would pass by conveyance of the railroad with its appurtenances.

"It was not competent, then," says the Solicitor General, "for the defendant company to farm out for toll to other rail- "road companies the right of way granted to it by the United "States across their bridge, because that was in violation of "the expressed intent of the United States in making the "grant."

Nothing in the record justifies the assumption that the defendant company has farmed out for toll to other railroad companies its right of way across the bridge. It has merely performed for other railroad companies services as a common carrier, which those companies, in common with all other persons, had the right to demand of it. If it has farmed out its right of way to those railroad companies, then it has farmed out its right of way to every other person or corporation for whom it has carried freight across the bridge. The railroad companies for whom it transports cars and freights upon its railroad stand in no different relation to the defendant than its other patrons, and the use of the bridge which the defendant made in carrying the cars and freight of other roads is identically the same use that it has made in carrying the cars and freight of anyone else. The defendant has no more "let or "assigned its restricted easement in this bridge to all the rail- "roads in the country that may desire to have their freight "carried over it" (brief, p. 14) than it has let or assigned such easement to all the shippers in the country that may desire to have their freight carried over it. If, by the rightful performance by the defendant of its duties as a common carrier, the "ownership of the bridge by the United States and "the rights reserved to them to let out the privilege to other "roads for hire are mere mockeries," (brief, p. 14) the fact may be disappointing, but it does not authorize the government to change the terms of its contract with the defendant.

4. THE BRIEF FOR THE GOVERNMENT MISCONCEIVES THE AVERMENTS OF THE PLEA AS TO THE MERGER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, TO WHICH THE GRANT WAS MADE, INTO THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, THE DEFENDANT HERE.

The statement of the brief is (p. 16): "The defendant in its "plea avers that *it* has become consolidated with certain other "railroad corporations under articles of consolidation," etc. This is not exact. The averment of the plea is that "The said "Chicago, Rock Island and Pacific Railroad Company," to which the grant was made, entered into certain articles of consolidation with certain railroad companies named, "whereby "the said constituent companies consolidated, united and "merged their capital stocks, corporate and other franchises, "rights, privileges and property of every nature and descrip- "tion and thereby created one consolidated corporation," to wit, the present defendant, and the right of way granted to the Chicago, Rock Island and Pacific Railroad Company thereby became vested in the consolidated corporation which the government has sued in this case. The railroad companies, parties to that consolidation, were none of them the railroad companies mentioned in the declaration, and none of the last named companies acquired any rights or have received any benefits from the consolidation. If the meaning of the illustration on page 17 of the government's brief is that the railroad company to which the grant of right of way across the bridge was made, could not transfer that right by consolidation to the consolidated company, it is answered that this suit does not present that question. Another answer, and to the merits, is furnished by the learned solicitor general himself (p. 17): "It may also be true that when several railroad companies be-

"come united under articles of consolidation, the joint com-
"pany receives and enjoys all the property rights, privileges
"and benefits theretofore held and enjoyed by each of its con-
"stituent parts." This has been expressly held with reference to a grant of lands by the Federal government.

Southern Pac. R. Co. v. *Poole*, 32 Fed. Rep., 451, 455.

More than this, the government is estopped to deny the right of the consolidated company to use the bridge, by permitting such use for many years, and by prosecuting this suit against it. The government cannot enforce against the defendant the obligations imposed by the act of 1881, and at the same time deny to the defendant the rights conferred by the legislation of which that act is an amendment. It did not attempt to do so on the hearing of this case below: it cannot do so now.

The judgment of the Circuit Court was right and should be affirmed.

Respectfully submitted.

ROBERT MATHER,
Attorney for Defendant in Error.

164-705

Office Supreme Court, U. S.
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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

No. 69.

UNITED STATES,
Plaintiff in Error,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

ROBERT MATHER,
ATTORNEY FOR DEFENDANT IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 63 DEARBORN ST., CHICAGO.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

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ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

I.

INTERPRETATION OF THE CONTRACT BETWEEN THE UNITED STATES AND THE RAILROAD COMPANY.

1. IN THE LIGHT OF PRECEDENT AND CONTEMPORANEOUS EVENTS.

It is, of course, conceded that the joint resolution of 1868 and the formal agreement, made in pursuance thereof, between the Secretary of War and the railroad company, constitute a contract between the company and the United States. A proper determination of the questions, arising

in this case requires, as a first step, a clear conception of the respective rights secured to the parties by this contract.

The material part of the joint resolution of 1868 is the first section:

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act of Congress 'making appropria-'tions for the support of the army for the year ending 'June thirty, eighteen hundred and sixty-eight, and for 'other purposes,' approved March two, eighteen hundred and sixty-seven, be, and the same is hereby, so amended as to authorize and direct the Secretary of War to order the commencement of work on the bridge over the Mississippi river at Rock Island, to connect the said island with the cities of Davenport and Rock Island: *Provided*, That the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, upon condition that the said railroad company shall pay to the United States, first, half of the cost of the superstructure of the bridge over the main channel and half the cost of keeping the same in repair, and shall also build at its own cost the bridge over that part of the river which is on the east side of the island of Rock Island, and also the railroad on and across said island of Rock Island; and upon a full compliance with these conditions said railroad company shall have the use of said bridge for the purposes of free transit, but without any claim to the ownership thereof; and said railroad company shall, within six months after said new bridge is ready for use, remove their old bridge from the river and their railroad track from its present location on the island of Rock Island: *And provided further*, That the government may permit any other road or roads wishing to cross on said bridge to do so by paying to the parties then in interest the proportionate cost of said bridge, but no such permission to other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company; and

that the total cost of said bridge shall not exceed the estimates made by the commissioners appointed under the act approved June twenty-seven, eighteen hundred and sixty-six: *And provided also*, That in no case shall the expenditure on the part of the United States exceed one million dollars."

It is, perhaps, immaterial in construing or interpreting this language, whether we treat it as a statute or as a contract; the rules of construction applicable to both will lead to the same conclusion. Thus, the rule in the construction of contracts, that "the situation of the parties at the time and of the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract, will often be of great service in guiding the construction; because * * * this intention will be carried into effect so far as the rules of language and the rules of law will permit" (2 Parsons on Contracts, 6th Ed., *499), has its counterpart in the rule, "that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

Smith v. *Townsend*, 148 U. S., 490, 494.
Holy Trinity Church v. *United States*, 143 U. S., 457, 463.

Fortunately, in this case, the court may look at the "contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body" (*Holy Trinity Church* v. *United States*, *supra*), in the light of a series of Congressional enactments which are *in pari materia* with the joint resolution of 1868, and which are necessarily read together with the latter act in any serious attempt to compass its full scope and meaning.

As early as 1862, Congress in "An act for the establishment of certain arsenals," approved July 11th, provided: "That there shall be, and hereby is, established a national arsenal * * * on Rock Island, in the State of Illinois, for the deposit and repair of arms and other munitions of war."

12 Statutes at Large, 537.

Title to the lands on Rock Island was then held or claimed by persons in possession, and in 1864, Congress, by "An act in addition to 'An act for the establishment "'of certain arsenals,'" approved April 19th, made elaborate provision for the condemnation of these private rights. By section one of that act, the Secretary of War was "authorized and empowered to take and hold full, complete and permanent possession in behalf of the United States, of all the lands and shores of the island of Rock Island." Section two provided that "the value of such private property so taken, and a just compensation for any damages caused by such taking, shall, if mutually agreed on by the Secretary of War and the rightful owner or owners thereof and approved by the President, be paid by the Secretary of the Treasury to said rightful owner or owners so agreeing." Section three authorized the appointment by the President of a board of three commissioners "whose duty it shall be to hear the parties interested, who may appear before them upon reasonable notice of time and place, and ascertain the true value of the land taken, and of the several parcels thereof that shall not have been conveyed to or paid for by the United States as hereinbefore provided, and the names and titles of the claimants thereof, if more than one, and their respective interests therein, and what compensation for the taking of their lands is due to each claimant."

The subsequent sections of the statute provide for such further action upon the report of the commissioners in the Courts of the United States, as shall be necessary to complete, by due process of law, the condemnation of the lands sought to be taken for this public use.

13 Statutes at Large, 50.

By "An act making further Provisions for the Establishment of an Armory and Arsenal of Construction, Deposit, and Repair on Rock Island, in the State of Illinois," approved June 27, 1866, Congress provided: "That the Secretary of War be, and is hereby, authorized and directed to change, fix, and establish the position of the railroad across Rock Island and the bridge across the Mississippi river at and on the island of Rock Island, so as best to accord with the purposes of the government in its occupancy of said island for military purposes; and in order to effect this he is authorized to grant to the railroad company a permanent location and right of way on and across Rock Island, to be fixed and designated by him with such quantity of land, to be occupied and held by the company for railroad purposes, as may be necessary therefor; and that the said grant and change be made on such terms and conditions previously arranged, between the Secretary of War and the companies and parties in interest, as will best effect and secure the purposes of the government in occupying the island.

SEC. 2. That the Secretary of War be, and is hereby, authorized to grant to the companies and parties in interest such other aid, pecuniary or otherwise, toward effecting the change in the present location of their road and bridge and establishing thereon a wagon road for the use of the government of the United States to connect said island with the cities of Davenport and Rock Island, to be so constructed as not materially to interfere with, obstruct, or impair, the navigation of the Mississippi river, as may be adjudged to be fair and equitable by the board of commissioners authorized under the act of April nineteenth, eighteen hundred and sixty-four, entitled 'An act in addition to an act for the establishment of certain arsenals,' and may be approved by him."

14 Statutes at Large, 75.

The board of commissioners in a report on the matter of the railroad and bridge across Rock Island and the Mississippi river, under date of February 2, 1867, adopted and recommended the following propositions as to the kind of wagon road that should be established, and

the amount and kind of aid that should be fairly and equitably granted by the government toward effecting that object, to wit:

"The Government to build over the main channel of the river an iron drawbridge in accordance with the conditions prescribed in the act of Congress of July 25th, 1866, the frame to be of proper breadth for a double track, the wagon way to be planted high enough to leave the lower chord for a railroad track, the Government to give the company the right of way over this bridge and across the island upon the payment of half the cost of the superstructure of the bridge, the bridge to be built with due regard to economy having reference to strength and durability; the company to have five years from January 1st, 1867, in which to connect with the new bridge and to remove its present tracks across the island and old bridge and piers from the main channel; the company to open wagon ways for the use of the Government through their present embankment on the island and remove as far as practicable present obstruction to wagon traffic between the island and city of Rock Island; the Government to have the right to connect with the track of the company, such side-tracks as may be desired for the United States and at such point as the Ordnance Department may select." (Rec., 9.)

The Chief of Ordnance, Brevet Major-General A. B. Dyer, in a report to the Secretary of War, dated February 8th, 1867, approved the foregoing recommendations of the board of commissioners. (Rec., 9.) This was the recommendation of the Chief of Ordnance which is referred to in the item in the appropriation act approved March 2, 1867, as follows: "For the erection of a bridge at Rock Island, Illinois, as recommended by the chief of ordnance, two hundred thousand dollars: *Provided*, that the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge for all purposes of transit across the island and river, upon the condition that the

said company shall before any money is expended by the government, agree to pay and shall secure to the United States, first, half the cost of said bridge; and, second, half the expenses of keeping said bridge in repair, and upon guaranteeing said conditions to the satisfaction of the Secretary of War, by contract or otherwise, the said company shall have the free use of said bridge for purposes of transit, but without any claim to the ownership thereof."

14 Statutes at Large, 485.

This was superseded in the following year by the more elaborate joint resolution of July 20, 1868, which has already been quoted.

15 Statutes at Large, 258.

In 1870, the plan of the bridge was changed from double track to single track, and the railroad given the use of the upper chord, the wagon road being laid on the lower.

16 Statutes at Large, 371.

This was the result of negotiations between the representatives of the government and the railroad company.

Executive Documents, 41st Congress, 2nd Session, Doc. 31.

It is not difficult to discover the design of Congress in this connected series of enactments. Its first anxiety was to obtain possession of the island for the public purpose to which it had been set apart. Hand in hand with this desire went the determination to make full compensation for all private property taken for this public use. Among other owners of private property, the government found on the island the railroad company, in the possession and use of a railroad across the island and of a bridge across the river. The bridge and railroad in their then location

evidently interfered with the government's plans for the use of the island. The effort of the government, however, was not, as in the case of other private property owners on the island, to oust the railroad company. It was doubtless foreseen that the maintenance and operation of a railroad on the island would be of advantage to the government in the comprehensive military scheme which was designed for future development there. Instead, therefore, of exercising its sovereign power of eminent domain to condemn the rights of the company on the island and over the river, Congress directed its efforts toward effecting, by negotiation, a change in the location of the road and bridge and the addition of a wagon road, for the use of the government, to the facilities of the latter structure. In harmony with its palpable willingness through the entire transaction to make full compensation for private property taken by the government, Congress authorized the commission created for the purpose of determining such compensation, to ascertain what aid, pecuniary or otherwise, the government should equitably give to the railroad company in execution of this plan. The commissioners acting under this authority doubtless found practical difficulties in the way of removing the old bridge from its then location and replacing the same structure in another place in the stream, and recommended in their report the construction by the government of a new bridge over the main channel of the river, "the government to give the company the right of way over this bridge and island upon the payment of half the cost of the superstructure of the bridge." This recommendation, varied somewhat in detail, became the substance of the legislation of 1867 and 1868.

The railroad company with which the government dealt

in these transactions, was a consolidated corporation existing under the laws of the States of Illinois and Iowa, owning and operating a railroad extending from Chicago, in Illinois, to Council Bluffs, in Iowa. It owned a bridge across the river and a right of way across the island, and upon this right of way and bridge its interstate railway was constructed and operated. (Rec., 6.) That portion of its railroad extending across the island and river was as much a part of its railroad as any other portion of its line. Over this portion, as well as over all other portions of its line, the railroad was conducting the business of a common carrier. As the owner of this public highway, this portion of its road, as well as all others, was open to the use of all persons desiring to have cars transported thereon. As a common carrier it was authorized and required to carry over this portion of its road, as over all other portions, both cars and freight for other roads. Under the laws of the States of Illinois and Iowa it was compelled to receive and transport over its line of railway, the cars of other roads. (Laws of Iowa, IX G. A., Ch. 158, Sec. 1, p. 183. I Gross' Statutes, Illinois, Ch. 86 *a*, Secs. 11, 12, 13.) Under the laws of the United States it was "authorized to carry upon and over its road and bridges, all * * * freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with the roads of other States so as to form continuous lines for the transportation of the same to place of destination."

Revised Statutes, § 5258.

Such was the character of the railroad company with which the government dealt; such were its powers and duties with reference to that portion of its railway located upon the island of Rock Island and the bridge across the Mississippi river at that point.

These two parties, thus situated, came together in mutual agreement. The government, proposing to build a new bridge across the main channel of the river, offered to the railroad company, and the latter accepted, "the right of way over said bridge *for all purposes of transit* across the island and river." This language, read in the light of the legislation and negotiations which had led up to it, could have had in the minds of the parties using it, but one meaning, namely, that the railroad company was to have the use of the bridge for all the purposes for which it was then using the bridge which by this offer it was induced to abandon. It surely cannot be conceived that it was in the contemplation of the railroad company that, by accepting this "right of way for *all* purposes of transit" across the government bridge, it was abandoning the right, which it theretofore unquestionably had, to carry over that portion of its railroad laid on the island and bridge the cars and freight of other roads. Nothing in the then situation demanded such a sacrifice on its part. Nothing in the attitude of the government suggested that such a sacrifice was required. On the contrary, what the government was seeking, and all that it was seeking, was the relocation of the railroad across the island and the bridge across the river. Not the slightest intimation was there in its then attitude or in its past conduct of a desire on its part to deprive the railroad of any of its powers, franchises or prerogatives with reference to that stretch of its road. It wanted the railway in a different place, but it did not want to rob it of any of its rights; on the contrary, it had been careful, even to the extreme of solicitude, to effect this change of location in such manner as not to embarrass, obstruct or interfere with the company's business. Nothing in the attitude of either of the parties to

the contract indicates that it was in the contemplation of either that in the use by the railroad company of that portion of its road laid over the new bridge, the company was to surrender any powers or functions that it might lawfully have exercised on that portion of its railroad laid over its own bridge. Much less was it the intention of either that the company's continuous line of road was now to be severed, and that the rails to be laid on the new bridge were thenceforth to be no part of its railroad. On the contrary, the solicitous care of both was to preserve the railroad, in its entirety and continuity, with both its physical facilities and its corporate powers unimpaired.

2. THE LANGUAGE OF THE AGREEMENT.

A. *The grant itself.*

Language could not be found more comprehensive and less suggestive of limitations than "the right of way over said bridge *for all purposes of transit* across the island and river." Certainly the grant is not *here* limited to a right of way for the purpose of hauling across the bridge in its trains none but the company's own cars, and not even "its own cars when carrying freight for other roads." If such limitation upon the grant exists, it must be found elsewhere.

B. *The consideration of the grant.*

The consideration paid by the company for the right of way across the government bridge does not suggest that it meant to cripple its capacity to transact the ordinary business of a common carrier.

"Upon condition," the grant proceeds, "that the said railroad company shall pay to the United States, first, half of the cost of the superstructure of the bridge over

the main channel and half the cost of keeping the same in repair, and shall also build at its own cost the bridge over that part of the river which is on the east side of the island of Rock Island, and also the railroad on and across said island of Rock Island." Compliance with these conditions cost the company in the neighborhood of one million dollars. (Rec., 6.) This, in addition to the abandonment of its old bridge, which had cost it nearly half a million. (Rec., 6.) It is not lightly to be presumed that the company assumed such extraordinary expenses for the purpose of exchanging a railroad (across the island and river) over which it had the right to transact *all* the varied business of a common carrier, for one over which it could transact only *a part* of such business. To impute such an intention to the company is to impute imbecility to its management, an imputation which is but seldom justified in the dealings of corporations with governments. Common experience would argue that the company intended to gain, not to lose something by virtue of this large expenditure. It was gaining nothing to be assigned to a new location on the island; that was of benefit to the government, not to the company. It may have gained something in acquiring the use of a more suitable and more durable bridge, but it certainly was paying handsomely for that advantage, and this, too, was something the government desired, even more keenly than the company. Indeed, it may be presumed that the company could have got along very comfortably in its old location and over its own bridge, if the government had not wished it to move. Yet it agreed not only to move, but to expend vast sums of money in the re-arrangement. Is it conceivable that it did all this with the intention not to gain advantages, but to suffer a distinct loss, in the surrender of its undisputed right to carry over that part of

its railroad which spanned the river, the cars and freight of other roads? An intention to part with this valuable right is not to be read into the joint resolution unless required by the plain necessities of the language employed.

"In construing statutes which are binding on States as contracts," this court has said, "the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which taking the whole statute together, it is apparent the parties intended they should have."

Per WAITE, C. J., in *Tennessee* v. *Whitworth*, 117 U. S., 129, 137.

C. *The provisos.*

a. As to the ownership of the bridge.

The intention to limit the railroad company in the use of the bridge, to the carriage of its own cars, and to forbid even *their* passage "when carrying freight for other roads" (Act of 1881), must be found, if at all, in the provisos of the joint resolution. Is it in the proviso, "that the ownership of said bridge shall be and remain in the United States"? This is a mere assertion of title. It differs in no respect from the reservation of the fee in the grantor which is a necessary incident of every grant of a "right of way," even where not expressly stipulated in the grant. The law would read this provision into the contract, by necessary implication, even if had been omitted from the act. The insertion of it has no other significance or effect than the legal implication would have in its absence. "If the parties expressly provided not

anything different, but the very same thing which the law would have implied, now this provision may be regarded as made twice; by the parties and by the law. And as one of these is surplusage, that made by the parties is deemed to be so; and hence is derived another rule of construction, namely, that the expression of those things which the law implies works nothing."

2 Parsons on Contracts (8th ed.), *515 (632).

This assertion of ownership, then, even though made thrice, once by the law and *twice* in the act, "works nothing" against the company. The grant to the company is to be read and understood as though the language of assertion were not in the act. So read and understood, while the ownership of the bridge remained in the goverment, the ownership of the railroad, which was merely moved from the old to the new bridge, remained in the company. The owner of a right of way on which a railroad is built acquires no interest in the railroad, and has no power of control over it other than such as he has expressly reserved in his grant of the right of way.

b. As to the permission to other roads to cross on the bridge.

The proviso that "the government may permit any other road or roads wishing to cross on said bridge to do so," furnishes no evidence of an intention on the part of either of the parties to limit the company to a more restricted use of that portion of its railroad to be laid over the government bridge than it made of the same portion of its road when it was laid on its own bridge. It is first to be noticed that this privilege reserved to the government is hedged in and limited by two important restrictions upon its use.

First. It can only be exercised in a specific way, viz., by the road or roads wishing to cross on said bridge "paying to the parties then in interest, the proportionate cost of said bridge."

"Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded." (Sutherland on Statutory Construction, Sec. 326.) The government, then, might permit any other road or roads to cross on the bridge "by paying to the parties then in interest the proportionate cost of said bridge," but it could not give such permission *in consideration of the payment by such other road or roads of a specific toll on each car that might cross the bridge.* In other words, the government might make a contract with "any other road or roads wishing to cross on said bridge," granting to such road or roads a right of way across the bridge only on the payment of a lump sum to be ascertained as prescribed in the act. That such a definite arrangement with some definite road and having a definite time of origin was contemplated by the language of the act, is demonstrated by the words, "by paying to the parties *then* in interest."

When in interest? Obviously at the time of the making of a contract between the government and the other "road or roads wishing to cross on said bridge." This idea of a definite contract, at a definite time, on the payment of a definite compensation, which so palpably inheres in this language of the joint resolution, is out of all harmony with the idea that the government therein acquired the right to permit the cars of other roads to be hauled across the bridge, *in the trains of the railroad company and by the motive power of the company*, in consideration of the payment of a toll by the other roads to

the company, for the use and benefit of the government. The government, if it wishes to permit such other roads "to cross on said bridge," must follow the authority given it in the act. It cannot, under the act, grant to other roads the right to cross on the bridge except upon the conditions there prescribed. It certainly cannot grant to other roads the right to have their cars hauled by the defendant.

Second. "*But no such permission to other roads shall impair the right hereby granted to the Chicago, Rock Island and Pacific Railroad Company.*"

Thus the government is limited not only as to the *terms* of the proposed grant to other roads but also as to its *effect*.

A prohibition upon the railroad company to carry in the regular course of its business as a common carrier the cars or freight of other roads across the bridge, *would* impair the right thereby granted, which was "the right of way over said bridge for *all* (not some) purposes of transit across the island and river." A prohibition of that right, therefore, is prevented by this language of the resolution. And, of course, if a total prohibition is within the bar of the language, a partial prohibition, which results from the requirement that the railroad company should account to the government for a portion of the tolls for such carriage, is likewise within the bar.

3. THE LIGHT THROWN UPON THE CONTRACT BY THE KNOWN USAGES OF THE RAILROAD BUSINESS.

"It is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary."

Hostetter v. *Park*, 137 U. S., 30, 40.

"Hence, an established custom may add to a contract stipulations not contained in it; on the ground that the parties may be supposed to have these stipulations in their minds as a part of their agreement, when they put upon paper or expressed in words the other part of it."

2 Parsons on Contracts, (8th Ed.) *537, (653).

Railroad companies, though not compelled to carry beyond their termini, may contract to do so. The custom of railroads to make such contracts, and to procure the carriage of their cars over the lines of other roads in performance of them, is universal and well-known, and has been fostered and encouraged and sometimes commanded by State and Federal legislation. This custom is conclusively presumed to have been known to the contracting parties, and entered into the contract between the government and the company. The grant of "the right of way "for all purposes of transit across the bridge," was made in contemplation of this custom and authorized the company to continue it.

This custom likewise helps to make clear the meaning of the proviso last considered. A railroad company with a line from New York to Chicago might lawfully contract to make delivery of freight in its own cars at Davenport. It would in such case, deliver its cars at Chicago to the defendant company who would carry them to their destination, crossing the bridge in doing so. In like manner, a railroad company with a line from Peoria, in Illinois, to Rock Island, might contract to deliver freight in its own cars at Davenport. In this case it would deliver its cars at Rock Island to the defendant company who would carry them to their destination, again crossing the bridge in doing so. The transaction is precisely the same in

both cases; the difference in the length of defendant's rails over which the cars are carried before reaching the bridge making no difference in the legal character of the acts. Now, it is clear that the New York company, with its western terminus in Chicago, would never wish to make a contract with the government for the right to cross on the Rock Island bridge; certainly not on the only terms on which the government could grant such a right, viz: "by paying to the parties then in interest the proportionate cost of said bridge." Such a contract for the right to cross on a bridge separated by the entire width of a State from its line of road would be a business impossibility, because beyond the range of business reasonableness or even sanity. The proviso, then, could not possibly contemplate the granting of permission by the government to such a road to cross on the bridge. And, of course, if the proviso could not, in its express provisions, operate upon such a road, no implications from it could so operate. That is, it is not to be implied from the proviso that, if such a road should not wish to purchase from the government, on the terms which the latter could offer, the right to cross on the bridge, the cars of that road should not be permitted to be carried across the bridge in defendant's trains. So that, as to such a road, the proviso clearly left the defendant railway company free to accept and carry its cars as theretofore.

The case of the road between Peoria and Rock Island differs only in physical situation. Its terminus being in Rock Island, in the State of Illinois, it cannot run its trains into Davenport, in the State of Iowa. This is not so much a defect of physical facility as a want of corporate power, the State of Iowa not having granted it a

franchise to do so. It is, of course, possible that such a road might desire to extend its line beyond Rock Island into the State of Iowa, and in that event, it might wish to acquire the right to cross on the bridge, in order that it might operate trains over its extended line. Such a road might find it to its interest to acquire such a right "by paying to the parties in interest the proportionate cost of the bridge." But it is perfectly obvious that no road, except one in such a situation, having a terminus either at Rock Island or Davenport, and having both the power and the desire to extend its line across the river into the adjoining State, could legally acquire or could afford such a luxury as the right to cross the bridge, on such terms, would be. Now, the proviso evidently contemplates that, even of those roads that might lawfully acquire such a right, some might not wish to have it, for it is only to "any other road or roads *wishing* to cross on said bridge" that the government is empowered to give such permission. What was to happen to those roads which for any reason (either that they had not the corporate capacity to go into the adjoining State or that the amount of their traffic that crossed the bridge did not justify the expense), did not wish to make such an arrangement with the government as the proviso authorized? Clearly nothing, so far as the government is concerned. Its interest in the affairs of all such other roads ceases when it fails to induce them to purchase on its terms permission to cross on the bridge. It cannot prohibit them from still making contracts for delivery at points beyond the bridge. Neither has it, in its contract with defendant, reserved the right to prohibit the latter from performing for such other roads the act of transportation across the island and bridge, in the manner in

which it was authorized and accustomed to perform such service when its rails crossed the river on its own bridge. In other words the contract, being made in contemplation of this well-known custom of interchange of cars among railroad companies, contemplated no interference with the custom in the case of such roads as should not wish to acquire from the government on the terms fixed in the act, the right "to cross on said bridge."

It is clear, in view of this custom, that by the right "to cross on said bridge," which the government was authorized to grant to other roads, was contemplated a right *to operate trains* over the bridge, and not a right to permit cars or freight belonging to such other roads to be hauled across the bridge in the trains of the defendant, operated by the latter's motive power and in the exercise of its own franchises. The idea that a railroad company in New York could not, after the making of this contract between the defendant and the government, perform its contract for the delivery of a car of freight in its own car at Davenport, without first obtaining from the government permission, not to cross the bridge itself, but for its car to cross the bridge in defendant's trains "by paying to the parties in interest the proportionate cost of the bridge," involves the most absurd consequences. For not only the New York company but every railroad company in the land would thus be required to pay "to the parties in interest the proportionate cost" of the Rock Island bridge, before any of their cars could pass over defendant's road, though composing part of its trains in the regular and customary course of its business as a common carrier. That either Congress in enacting, or the railroad company in accepting the joint resolution of 1868, intended such an absurdity, is beyond conception.

Even the draftsman of the act of 1881 avoided this absurdity. Its language is that the joint resolution "is hereby so amended as to require the Chicago, Rock Island and Pacific Railroad Company to charge for any cars carrying freight, *other than those passing over its own road*, and for its own cars when carrying freight for other roads, which it may carry across said bridge, a sum not exceeding three dollars for every loaded car, two-fifths of which sums shall be paid by said railroad company into the Treasury of the United States each month."

Cars received by defendant from other roads at Chicago or other points on its line, and carried to Rock Island from the East or to Davenport from the West, are clearly cars "passing over its own road." For such cars the act does not require defendant to render tribute to the government. Such is the clear reading of the act, and such the construction put upon it by the government; for the declaration in this suit declares only for tolls on the cars of the four roads terminating at Rock Island and Davenport. Doubtless the act of 1881 was aimed only at these roads. By thus singling them out, the government confesses that these are the roads to which it hoped to grant the right "to cross on said bridge." It further confesses that the right "to cross on said bridge," which the proviso reserves power to grant, is not the mere indefinite right to procure its cars and freight to be transported across the bridge in defendant's trains (for this right is conceded, without compensation, to all roads except the four terminating at Rock Island and Davenport) but an active, definite, physical right to operate trains across the bridge. This reads the proviso into harmony with the established policy of Congress in reserving, in all its grants of franchises for the construction of bridges across navigable

streams, the right in favor of connecting roads to cross such bridges with their trains.

Union Pacific Ry. Co. v. *Chicago, etc., Ry. Co.*, 163 U. S., 564, 587.

The four roads named in the declaration are the only ones that could possibly have use for such a right across the Rock Island bridge. Because they have not seen proper to purchase that right from the government, the latter seeks by the act of 1881 and by this suit, to reach these four roads in another way, by requiring the defendant to charge and account for to the government, a specified toll for the service of transportation across the bridge performed for them by defendant, though every other road in the land may have that service for any toll, or no toll, at defendant's option, and defendant, if it charges them a toll, may retain it.

Now, it would seem to be clear that, if its contract with the government gave to the defendant the right to carry across the bridge, without rendering a toll to the government, the cars of all other roads, it also gave the right so to carry across the bridge the cars of these four Davenport and Rock Island roads. For, as we have seen, the carriage for the one is done in pursuance of the same business custom that induces the carriage for the other; the service is identical in both cases; and no distinction is drawn in the joint resolution between roads terminating at Rock Island and Davenport and those terminating elsewhere. If defendant can carry across the bridge for one, it can for all.

Indeed, the very description which exempts the cars of the other roads from the payment of toll, exempts also the cars of the roads named in the declaration. Cars

"*other* than those passing over its own road" are the only cars for which the toll must be paid. The cars of the roads named in the declaration necessarily pass over defendant's own road both before and after they are carried across the bridge. Even if the unreasonable contention should be upheld that the rails of defendant laid on the bridge are not part of "its own road," certainly no such claim can be made as to its rails on the island and in the cities of Davenport and Rock Island; those rails are undoubtedly "its own road." None of the provisos of the joint resolution relate to the railroad on the island. The Solicitor General has taken the trouble to point out the exact points of connection of these roads with that of defendant (Appendix to Brief); though the fact that such connections are not at the bridge, appears from the averments of the plea. (Rec., 8.) These points are, all of them, far distant from the bridge. The cars of the roads named in the declaration, when carried by defendant from these points of connection to the bridge on one side, and beyond the bridge to their destination on the other side, are "cars passing over its own road" as truly in fact, and with the same legal effect, as are cars of other roads carried by defendant from Chicago to and beyond the bridge. The difference in mileage works no difference in the legal effect of the act. The cars for which recovery is here sought, therefore, come within the exception of the act of 1881. This is not urged here as substantive matter of defense; I am only pointing out that the cars of the roads terminating at Rock Island and Davenport which defendant carries across the bridge and for which a toll is sought to be recovered in this suit, differ in no respect, in relation to the rights of the government, from the cars of other roads which connect

with and deliver their cars to the defendant at other points on its line, and which are clearly exempted from the imposition of this toll by the act of 1881. The significance of this reflection becomes apparent when it is considered that the words "any other road or roads" in the proviso of the joint resolution include, *ex vi termini*, not only the roads terminating at Rock Island and Davenport, but all other roads as well. The government has no greater rights in the case of one road than of another. If, under its contract, the defendant may not be compelled to render a toll for the car of one road which it carries from Chicago to Davenport, as is conceded even in the act of 1881, it may not be compelled to pay such toll for the car of another road which it carries from Rock Island to Davenport.

This review of the history and the language of the contract between the government and the company, and of the known usages that entered into and became part of the agreement, leads to these conclusions:

1. The sole purpose of the government, so far as the railroad company was concerned, was to secure a re-location of its line on the island and over the river.

2. No intention is discoverable either in the history of the negotiations or in the language of the final contract to prohibit to the railroad company the transaction of any portion of the business of a common carrier which it had theretofore lawfully done, or might lawfully do over its own bridge.

3. The sole right reserved to the government, so far as the use of the bridge for railroad purposes is concerned, was to permit other railroads having necessity and power to do so, to operate their trains across the bridge.

4. This right could be exercised only under two conditions:

a. Upon payment by the party to whom the right should be granted of the proportionate cost of the bridge.

b. In such manner as not to impair the rigbt granted to the defendant railroad company.

5. In the event other roads should not wish to acquire such right from the government, the defendant was not prohibited to co-operate with them in the transaction of the transportation business of the country, but might, as theretofore, carry their cars and freight in its own trains across the bridge, as required in the ordinary course and custom of the business.

II.

SUCH HAS BEEN THE PRACTICAL CONSTRUCTION PUT UPON THE CONTRACT.

1. By the War Department.

"It is a settled doctrine of this court that in case of ambiguity, the judicial department will lean in favor of a construction given to the statute by a department charged with the execution of the statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced."

United States v. *Alabama R. R. Co.*, 142 U. S., 615, 621.

United States v. *Union Pacific R. Co.*, 148 U. S., 562, 572.

Edwards v. *Darby*, 12 Wheat., 206.

United States v. *Moore*, 95 U. S., 760, 763.
United States v. *Pugh*, 99 U. S., 265.
Brown v. *United States*, 113 U. S., 568, 571.

The railroad company, upon the completion of the new bridge, with the consent and approval of the government, built its railroad over, upon and across the bridge and island, and thereafter for thirteen years "operated its railroad over, upon and across said bridge and island as a part of its continuous line of railway from the City of Chicago, in the State of Illinois, to the City of Council Bluffs, in the State of Iowa, in the transaction of its business as a common carrier of goods and passengers." (Plea, Rec., 6, 7.) That business, as elsewhere alleged in the plea, includes the carrying of both cars and freight for other roads. (Rec., 8.) The War Department, in possession of the island and of the bridge during all this time, made no claim that the railroad company was required by its contract with the government to account to the latter for any revenues received for the carriage across the bridge of the cars or freight of other roads. This was a practical construction of the contract which, under the rule quoted, this court will follow. No claim for tolls from 1868 to 1881 is even now asserted.

2. By Congress itself.

Every year since it was authorized, the Rock Island bridge has been a subject of consideration by Congress and a source of legislation by that body. Appropriations for continuing the construction, for operating, repairing or protecting the bridge have annually been made.

16 Statutes at Large, 300; 16 *id.*, 371; 16 *id.*, 505;

17 *id.*, 639; 18 *id.*, 221; 18 *id.*, 387; 19 *id.*, 113; 19 *id.*, 357–358; 20 *id.*, 220; 20 *id.*, 386; 21 *id.*, 192; 21 *id.*, 267. (These citations end with 1881, though annual appropriations are still made.)

In a number of these acts the interest of the defendant in the bridge is expressly recognized. For example, the appropriation for the year 1876 (18 Stat., 387); "For Rock Island Bridge: for care and preservation of the bridge thirteen thousand dollars; and this sum and the appropriation for said bridge for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, shall be expended in accordance with the joint resolution in relation to the Rock Island bridge, approved July twentieth, eighteen hundred and sixty-eight, and the contract between the United States and the Chicago, Rock Island and Pacific Railroad Company."

The silence of Congress during all of this time upon the subject of the transportation by the railroad company of cars and freight for other roads implies that Congress did not construe the act as giving to the government the right to prohibit such transportation. That such was the Congressional construction is conclusively proven by the language of the act of 1881 itself, which boldly asserts that the provisions of that act are *in amendment* of the joint resolution of 1868. The language of the act is:

"That the joint resolution approved July twentieth, eighteen hundred and sixty-eight, authorizing the construction of the bridge over the Mississippi river 'to connect the island of Rock Island with the cities of Davenport and Rock Island; *is hereby so amended* as to require the Chicago, Rock Island and Pacific Railroad Company to charge for any cars carrying freight other than those passing over its own road, and for its own cars when carrying freight for other roads, which it may carry across said bridge, a sum not exceeding three dollars for every loaded car, two-fifths of which sums shall be paid

by said railroad company into the Treasury of the United States each month."

21 Statutes at Large, 482.

If the contract between the government and the company (the joint resolution of 1868) authorized the government to require the railroad company to do these things, it would not have been necessary to "amend" that contract. The fact that Congress found it necessary to amend the act in order to create the right against the railroad company is a clear confession that the government had no such right under the original contract. This is too clear for argument.

III.

THE LANGUAGE OF THE JOINT RESOLUTION OF 1868 IS THE LANGUAGE OF CONGRESS; IT SHOULD THEREFORE BE TAKEN MOST STRONGLY AGAINST THE GOVERNMENT.

"The reason of the rule '*contra proferentem*' is that men may be supposed to take care of themselves; and that he who gives, and chooses the words by which he gives, ought to be held to a strict interpretation of them, rather than he who only accepts."

2 Parsons on Contracts, 8th Ed., *507 (625), and notes.

If any lingering doubts remain as to the inability of the government under the contract of 1868 to "require" the railroad company to charge and account for to the government a specified toll for the cars and freight of other roads which it may carry across the bridge in the performance of its functions as a common carrier, they should be dissipated by this rule of construction. The

joint resolution was an offer by the government of certain rights to the railroad company. If the offer is at all ambiguous, its meaning is to be resolved in favor of the company and against the government.

"Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language."

Per MILLER, J., in *Garrison* v. *United States*, 7 Wall., 688.

Noonan v. *Bradley*, 9 Wall., 394, 407.

IV.

THE GOVERNMENT CAN SUCCEED ON THIS APPEAL ONLY ON THE PROPOSITION THAT THE PASSAGE OF THE ACT OF 1881 WAS A RIGHTFUL EXERCISE OF CONGRESSIONAL AUTHORITY.

1. THE SUIT IS BROUGHT UNDER THE ACT OF 1881.

The declaration and the bill of particulars follow exactly the language of the act of 1881. The effort is alone to recover two-fifths of the toll of three dollars per car prescribed by that act and attempted to be reserved as the government's proportion. This is not an action to recover on a *quantum meruit* for any alleged excessive use of the bridge by the railroad company. The plaintiff's right to recover depends alone on the validity of the act on which the suit is brought.

2. THE CASE WAS DECIDED BELOW EXPRESSLY ON THE ACT OF 1881.

The opinion of the Court says: "The declaration is based upon a special act of Congress providing for the ascertainment of the rentals due for the use of the

bridge, and upon the alleged fact that the defendant railway company has been transporting freights from the Illinois to the Iowa side of the river for the Chicago, Burlington and Quincy Railroad and other railway companies, for which it has been receiving compensation, and seeks to recover under the special act of Congress." (Rec., 26.)

3. THE ASSIGNMENTS OF ERROR ARE BASED ON THE ACT OF 1881.

The first and second assignments are general, pointing out no specific grounds of error. The third assignment is: "The said Court erred in overruling the said demurrer and thereby giving no effect to section two of the act of Congress, approved March third, eighteen hundred and eighty-one, and entitled 'An act making appropriations for the construction, completion, repair, and preservation of certain works on rivers and harbors and for other purposes.'" The fourth, fifth and sixth asssignments also refer to the same act. (Rec., 28, 29.)

4. THE ONLY BASIS FOR AN APPEAL TO THIS COURT IS THE PROPOSITION THAT THE CONSTITUTIONALITY OF THE ACT OF 1881 IS DRAWN IN QUESTION.

This case was decided and the writ of error taken since the passage of "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3rd, 1891. (26 Statutes at Large, 826; Supplement to Revised Statutes, 901.) The appeal to this Court is alone justified by that clause of Section five of the act which reads:

"That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: * * * In any case in which the constitutionality of

any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. * * *"

5. THE SOLE QUESTION FOR DECISION HERE, THEREFORE, IS THE CONSTITUTIONALITY OF THE ACT OF 1881.

The plaintiff asserts its rights under this act; the defendant avers that the act is void in that it seeks to alter the terms of defendant's contract with the government, which is beyond the Congressional power. If this does not raise an issue as to the "constitutionality" of the act of 1881, then the writ of error should be dismissed, for, without such an issue, this Court has no jurisdiction of the cause.

V.

THE ACT OF 1881 ATTEMPTS TO ALTER THE CONTRACT BETWEEN THE RAILROAD COMPANY AND THE GOVERNMENT.

This proposition cannot require further demonstration. Such is the avowed intention of the act; such is its palpable effect. The right "to require" the defendant to charge for the cars and freight of other roads carried across the bridge, and to render a portion of such toll to the government was not secured to the government by the joint resolution of 1868. It is created, if it exists at all, by the "amendment" to that joint resolution, passed thirteen years later.

VI.

THE GOVERNMENT HAS NO POWER THUS TO CHANGE ITS CONTRACT WITH THE DEFENDANT.

Sinking Fund Cases, 99 U. S., 700, 719.
Railway Company v. *United States*, 104 U. S., 680, 684.
United States v. *Railroad Company*, 118 U. S., 235, 240.
Planters' Bank v. *Sharp*, 6 How., 319.
Woodruff v. *Trapnall*, 10 How., 207.

In *Chicago, etc., Railway Co.* v. *United States*, 104 U. S., 680, where was in issue the right of the government to reduce the compensation agreed upon in its contract with the railway company for carriage of the mails, it was said by Mr. Justice MATTHEWS (p. 684):

"The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. * * * It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself. * * * (p. 685.) The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid and binding on the United States, as well as upon the railroad company. They contained, within themselves, a mode for lessening, or, if deemed best, for discontinuing entirely, the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties."

In *Planters Bank* v. *Sharp*, *supra*, it was said by WOODBURY, J.:

"Mr. Madison denounced laws impairing the obligations of contracts as among those not only violating the

Constitution but '*contrary to the first principles of the social compact and to every principle of sound legislation.*' (Federalist, No. 44.) Again, in *Payne et al.* v. *Baldwin et al.*, 3 Smedes & Marshal, 677, one of the cases now before us, it is truly admitted that, 'in a government like ours such power is totally out of the range of legislative authority.' "

It was, therefore, beyond the Constitutional power of Congress to pass the act of 1881.

Respectfully submitted.

ROBERT MATHER,
Attorney for Defendant in Error.